Supreme Court, U.S.
FILED

No. 10-600 OCT 25 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

PAUL A. PIPER

Petitioner,

vs.

UNITED STATES

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL A. PIPER
19826 No. 129th Drive
Sun City West, AZ 85375
623-975-0732

QUESTIONS PRESENTED

The question presented by the petitioner is why was this case not heard by either the Federal Court of Appeals or the Federal Claims Court because I was not an employee of the federal government and that the employer must be held liable based on the unlawful intent of the HR, causing undue hardship?

The additional question also presented was that I was hired by appointment and not a contract and therefore my claim was not legal. This is also incorrect because I was not hired yet so how can all the reasons presented affect me?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION ... 3

CONCLUSION 6

APPENDIX

Judgment of Court of Appeals ..... App. 1

Judgment of Court of Claims ..... App. 2

Opinion and Order of Court of Claims ..... App. 3

TSA Guide to Major Ethics Rules ..... App. 33

The Tucker Act ..... App. 35

Claim for Damages ..... App. 37

TABLE OF AUTHORITIES

Page

28 U.S.C. § 1254(1) 1

TSA Guide to Major Ethics Rules 1, 3

The Tucker Act 1

OPINIONS BELOW

The opinion from the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit have not indicated as to whether the case will be or has been published.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on 5 May 2010. A petition of writ of certiorari was filed on 30 July 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This case can be ruled using the Tucker Act. The United States Court of Appeals for the Federal Circuit dated 5 May 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tucker Act passed in 1887 was a jurisdictional statute which expanded the scope of claims the Court of Claims could hear. The act did two things: (1) Plaintiffs could seek judgment against the federal government for claims based upon the U.S. Constitution; (2) Circuit Courts received concurrent jurisdiction with the Court of Claims for money damage claims of up to $10,000.

The Tucker Act has jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of

Congress or any regulation of an executive department.

STATEMENT OF THE CASE

The case simply stated is that during the hiring process starting in December 2005 through my actual hiring in December 2006 I asked every HR person "Did it matter that I was a retired civil servant with regard to my retirement." Normally, if I was to be rehired into a civil servant position, I would have to give up my retirement that I was collecting. Every one of the HR personnel who talked to me said I would not lose my retirement and that there was a waiver to allow us to be rehired and this waiver did not affect the retirement.

The United States argued that I was a reemployment person and was hired by appointment and could not file a claim. Every case cited was about a employee filing against the United States. The important part is that I was not an employee when the violation occurred during the hiring process nor when I filed the claim after I resigned. In both, periods I was a civilian.

The Court of Federal Claims concluded that it did not possess jurisdiction to rule on my case because such a claim sounds in tort. That also is wrong if you understand the reason behind my claim.

Both Courts claim they do not have jurisdiction to rule on this case.

REASONS FOR GRANTING THE PETITION

In both cases presented to the Court of Claims and the Court of Appeals, it was stated that I was not a federal employee and in every case presented by the United States related to a current employee filing a claim. The Tucker Act does provide the jurisdiction to rule on the case as presented. The United States said that the Act did not have the jurisdiction because I was appointed. None of this matters because the failure or the HR people of TSA, to either to tell the truth of lied, *during the hiring process* was before any appointment. This failure to tell me the truth or provide me the options was very important in my accepting the position. Because I am a retired federal employee, normally I would have to forfeit my retirement or pay back the amount of my retirement. This would be taken from my current payroll. If I had been told the truth that I would have to pay back my already earned retirement or even there was a chance that I might have to pay back earned retirement I would not have retired from my current position to accept this new career position. The next defense presented by the United States was that I was appointed and not hired under a contract. Again, this does not matter because it is against all laws to a prospective employee.

To cause undue hardship to a person because of failing to tell the truth during hiring process is against federal law.

This failure from the TSA HR personnel caused me to lose years of employment with the Army Non-Appropriated position, funds to cover my PCS move and relocation expenses and a larger retirement fund. This is just not right nor is it good practice and do we know how many other people were conned into this hiring fraud,

The facts that relate to this case are as follows:

1. I applied for a position with TSA in December 2005.

2. The hiring practice took one year.

3. During this period I asked at least six HR personnel about the concern I had with being a retired civil servant. To the person they all said it did not matter because all retired civil servants were granted a waiver.

4. I was currently employed by the Department of Army as a Non-Appointed employee, *not a federal employee.*

5. Upon the verbal guarantee that I would be given a waiver, I retired from the Army's Non-Appropriated position in December 2006.

6. In January 2007, I paid for my PCS move from California to Colorado and started to work on 15 January 2007.

7. In late March of 2007 received a call from the finance office in Washington DC, to inform me that they had discovered that I was a retired civil servant and that I would have the amount of my retirement check subtracted from my TSA pay.

8. Talked to the Region Director in Grand Junction the next day who informed me that there was a waiver in place when I was hired but he was told that it had been discontinued and there was nothing he could do.

9. Forced to resign and move out of Gunnison, CO.

During both cases filed with the Federal Claims Court and the Federal Appeals Court, the United States did not deny and in fact they agreed that I did ask about the importance of the fact that I would or would not have to lose my retirement.

To the person everyone over the year of processing told me that there was a waiver and I would not lose my retirement. Working on that information I accepted the position of Security Officer at Gunnison, CO, airport.

CONCLUSION

I request that the Supreme Court of the United States approve the case in awarding damages incurred because of the false information presented during the hiring process by the Transportation Security Agency.

Respectfully submitted,

PAUL A. PIPER

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2010-5082

PAUL A. PIPER,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the United States Court of Federal Claims

In CASE NO(S). 09-CV-193.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER
OF THE COURT

DATED MAY – 5 2010

/s/ Jan Horbaly
Jan Horbaly, Clerk

In the United States Court of Federal Claims

No. 09-193 C

PAUL A. PIPER

v. **JUDGMENT**

THE UNITED STATES **FILED DEC 17 2009**

Pursuant to the court's Opinion and Order, filed December 17, 2009, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, for lack of jurisdiction.

Hazel C. Keahey
Clerk of Court

December 17, 2009 By: /s/ Debra L. Sander
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $455.00.

In the United States Court of Federal Claims

No. 09-193 C
(Filed: December 17, 2009)

**********	*	RCFC 12(b)(1); Re-
PAUL A. PIPER,	*	employed Annuitant;
	*	Transportation Security
Plaintiff,	*	Administration; Employ-
	*	ment by Appointment;
v.	*	Misrepresentation;
	*	Standard Form 50;
THE UNITED STATES,	*	Implied-In-Fact Contract;
	*	Express Oral Contract;
Defendant.	*	Application to Proceed
**********	*	*In Forma Pauperis*

Paul A. Piper, Sun City West, AZ, *pro se*.

Antonia R. Soares, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Judge

Plaintiff is a retired federal employee who chose to retire from his position with the United States Army ("Army") and then reenter federal service as a Transportation Security Officer with the Transportation Security Administration ("TSA"). In making this decision, plaintiff relied upon the TSA's purported assurances that his status as a federal retiree would not affect the terms of his employment with the TSA,

However, upon plaintiff's reemployment, the TSA began to deduct his retirement annuity from his pay. This unanticipated and substantial reduction in income forced plaintiff's resignation from the TSA. Plaintiff now seeks damages under a breach of contract theory for the TSA's alleged misrepresentations. Before the court are defendant's motion to dismiss for lack of jurisdiction and plaintiff's application to proceed *in forma pauperis*. As explained in more detail below, the court grants both motions.

I. BACKGROUND[1]

Plaintiff Paul A. Piper was an officer in the Army, serving on active duty from 1963 to 1981, and in the active reserve from 1981 until his retirement in 1993. Compl. Ex. 2 at 2; Compl. Ex. 3 at 27-28. At the time of his retirement from the Army, he was employed by the United States Department of Defense ("Department of Defense"). Compl. Ex. 3 at 19. Upon leaving the Department of Defense in 1997, plaintiff accepted employment outside of the federal government. *Id.* at 14-19. He returned to federal employment in 2004, serving in several positions within the military, including Business Manager for the Army's Morale,

[1] The court derives the facts in this section from plaintiff's complaint ("Compl."), the exhibits attached to the complaint ("Pl.'s Ex."), plaintiff's opposition to defendant's motion to dismiss ("Opp'n"), the exhibit attached to defendant's reply in support of its motion to dismiss ("Def's Ex."), and plaintiff's surreply to defendant's motion, to dismiss ("Surreply").

Welfare, and Recreation Department at Fort Riley, Kansas, and Fort Hunter Liggett, California. *Id.* at 12-14.

In December 2005, while working at Fort Riley, plaintiff responded to a newspaper advertisement seeking applicants for Transportation Security Officer positions with the TSA, part of the United States Department of Homeland Security ("Department of Homeland Security"). Compl. Ex. 7 at 1. When discussing his application with the TSA's human resources department, he indicated that he would be joining the TSA as a retired military and civilian employee and inquired whether his retirement status would affect his application. Compl. ¶ 3. He was particularly concerned that retirees could not obtain employment with the federal government and that if he was able to obtain federal employment, his retirement annuity would be reduced. Compl. Ex. 7 at 1. Plaintiff was informed that his retirement status would not affect his application because the TSA's hiring process differed from other executive agencies. *Id.*; Compl. ¶ 3. To further assuage plaintiff's concerns, the TSA's human resources department referred him to the "TSA HR Orientation Guide," which provides:

> Most Federal Government agencies are in the competitive civil service and are governed by regulations based on Title 5 of the U.S. Code. Like some other agencies, . . . TSA's implementing statute put the agency outside of the competitive civil service. . . .

. . . .

> Excepted service is defined as all positions in the executive branch of the Federal Government that are specifically excepted from the competitive service by statute, Executive Order, or [the United States Office of Personnel Management ("OPM")]. Examples of excepted service agencies include the . . . TSA. . . . Excepted service agencies can use their own hiring systems and evaluation criteria to fill vacant positions.

Compl. Ex. 1 at 1-2.

With these assurances, plaintiff formally applied for a position with the TSA. Compl. ¶ 6; Compl. Ex. 7 at 1-2. He submitted Optional Form 306, "Declaration for Federal Employment," which contained information about his military service, and Standard Form 86, "Questionnaire for National Security Positions," which contained detailed information about his military service and prior federal employment. Compl. ¶¶ 4-5; Compl. Ex. 2; Compl. Ex. 3. Throughout the extended application process, plaintiff was never informed that his status as a retiree would have a negative effect on his sought-after employment with the TSA. Compl. Ex. 5 at 1; Compl. Ex. 7 at 2.

On November 7, 2006, the TSA notified plaintiff that he had successfully completed the requirements for "appointment" as a Transportation Security Officer and would therefore be placed in pool of candidates from which open positions would be filled.

Compl. Ex. 4 at 1. Then, just over a month later, the TSA offered plaintiff "a contingent appointment in the excepted service for the position of Transportation Security Officer (Screener), SV-1802-D, effective January 21, 2007[,] at the Gunnison-Crested Butte Regional Airport." *Id.* at 4. Plaintiff's appointment was contingent upon satisfactory results from a drug test, background investigation, and credit check. *Id.* Further, plaintiff was required to undergo a two-year trial period. *Id.* The offer letter did not address how plaintiff's retirement status would affect his pay. *Id.* at 4-5; Compl. ¶ 6; Compl. Ex. 7 at 2. Plaintiff accepted the offer of employment, Compl. Ex. 4 at 5, retired from his position with the Army, Compl. ¶ 6, and relocated from Fort Hunter Liggett, California to Gunnison, Colorado, Compl. Ex. 7 at 2. *See also* Compl. Ex. 5 at 2.

On January 25, 2007, the TSA issued a Standard Form 50, "Notification of Personnel Action" ("SF-50"),[2] reflecting plaintiff's excepted service appointment under the authority of Public Law 107-71, *i.e.*, the Aviation and Transportation Security Act, Def.'s Ex. 1 at 1; *see also id.* at 2 (noting that plaintiff had executed an appointment affidavit on January 22, 2007, and that plaintiff's appointment was subject to his successful completion of a two-year trial period). In

---

[2] An SF-50 is a standard personnel form used across the federal government to record personnel actions. *Horner v. Acosta*, 803 F.2d 687, 689 n.2 (Fed. Cir. 1986).

the "Remarks" field, which spanned two pages, the TSA provided:

> As a reemployed annuitant, you serve at the will of the appointing officer.[3] Annual salary to be reduced by the amount of your retirement annuity and by further cost of living increases. . . . You are required to submit to the personnel office a copy of any subsequent notice from OPM of any changes in your gross annuity rate.

Id. at 1-2 (footnote added). Plaintiff avers that the TSA did not provide him with a copy of this SF-50. Surreply 3-4.

Approximately three months into his tenure as a Transportation Security Officer, plaintiff received a telephone call from the finance office at TSA Headquarters informing him that as a federal retiree receiving a retirement annuity, his pay would be reduced by the amount of his annuity. Compl. ¶ 7; Compl. Ex. 5 at 1; Compl. Ex. 7 at 2. He inquired as to why he was not provided with this information prior his acceptance of the offer of employment, but received no response. Compl. Ex. 7

---

[3] In addition, the "Annuitant Indicator" code contained in box twenty-eight of the SF-50 reflected that plaintiff was a "[r]etired uniformed service officer and reemployed FERS annuitant . . . who is subject to salary offset." U.S. Office of Personnel Mgmt., *The Guide to Personnel Data Standards: Annuitant Indicator* 2 (2009), http://www.opm.gov/feddata/gp59/cpdf/annuitindicator.pdf.

at 2. He immediately contacted the Human Resources Specialist at the TSA office in Grand Junction, Colorado, Mae Pittman, who advised plaintiff to contact the director of the office, Rene Dhenin. Compl. ¶ 8. Mr. Dhenin explained to plaintiff that although the TSA had granted waivers to prevent the reduction of annuitants' pay in the past, it appeared that the practice had ended, and that there was nothing that he could do to assist plaintiff. *Id.*; Compl. Ex. 7 at 2.

Because the pay reduction made living in Gunnison, Colorado unaffordable for plaintiff, he was compelled to resign from the TSA. Compl. ¶ 9; Compl. Ex. 7 at 2. The TSA issued another SF-50 reflecting plaintiff's resignation, which was effective July 26, 2007. Compl. Ex. 5 at 3. Plaintiff then moved to Sun City West, Arizona, and sought, unsuccessfully, other employment. Compl. Ex. 7 at 2.

Plaintiff subsequently submitted a claim to the Administrator of the TSA for breach of contract under the Tucker Act, alleging that had the TSA informed him of the actual effect his retirement status would have on his Transportation Security Officer pay, he would not have retired from his position with the Army, accepted employment with the TSA, and moved to Colorado. Compl. Ex. 7 at 1-4. He thus sought from the TSA (1) the pay he would have received had he remained in his position with the Army; (2) the associated increase in retirement benefits; (3) reimbursement of expenses for the moves between California and Colorado and between Colorado and Arizona; and (4) damages for his pain and

suffering. *Id.*; Compl. ¶ 11. Plaintiff's complaint was referred to the TSA's Office of Chief Counsel. Compl. Ex. 8 at 1. The Acting Deputy Chief Counsel denied plaintiff's claim, explaining:

> The courts have long recognized that federal government employees hold their positions by appointment and not by employment contract. . . . Consequently, as a former federal security screener employed by the TSA, your relationship to TSA is best categorized as an appointment and not contractual. Because you had no contract of employment, your Tucker Act claim is without merit.

Id. (citations omitted).

Plaintiff next sought relief from all three of his representatives in Congress-Senators John McCain and Jon Kyl and Representative Trent Franks. Compl. ¶ 15; Compl. Ex. 9. The TSA responded to the congressional inquiries with letters indicating that plaintiff "joined TSA as a reemployed Federal annuitant and his salary was required to be offset by the amount of his Federal annuity." Compl. Ex. 9. Still lacking the relief he sought, plaintiff filed the instant action. As with the claim he submitted to the TSA, plaintiff seeks damages under the Tucker Act for the TSA's "failure to properly provide [him] the truth regarding [his] reemployment options" during the lengthy hiring process. Compl. ¶¶ 1-2. In particular, plaintiff seeks reimbursement for lost pay, relocation expenses for both moves, and housing expenses, as well as damages for "[t]rouble and medical trouble."

Compl. Ex. 10; *accord* Compl. ¶¶ 16-17. Defendant has moved to dismiss plaintiff's complaint for lack of jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). The court has reviewed the parties' briefs and deems oral argument unnecessary.

II. LEGAL STANDARDS

A. RCFC 12(b)(1) Motion to Dismiss

In ruling on a motion to dismiss, the court assumes that the allegations in the complaint are true and construes those allegations in plaintiff's favor. *Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995). However, plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject matter jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). The court may look to evidence outside of the pleadings to determine the existence of subject matter jurisdiction. *Land v. Dollar,* 330 U.S. 731, 735 & n.4 (1974); *Reynolds,* 846 F.2d at 747. If the court concludes that it lacks subject matter jurisdiction over a claim, RCFC 12(h)(3) requires the court to dismiss that claim.

B. Subject Matter Jurisdiction

Whether the court has jurisdiction to decide the merits of a case is a threshold matter. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998).

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868). The parties or the court *sua sponte* may challenge the court's subject matter jurisdiction at any time. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood,* 312 U.S. 584, 586 (1941). The waiver of immunity "cannot be implied but must be unequivocally expressed." *United States v. King,* 395 U.S. 1, 4 (1969).

The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2006). However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan,* 424 U.S. 392, 398 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the

United States." *Loveladies Harbor, Inc. v. United States,* 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc). Here, plaintiff alleges that the substantive source of jurisdiction is an employment contract with the TSA.

C. Federal Government Employment

It is well-settled that "Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods and services. . . ." *Army & Air Force Exch. Serv. v. Sheehan,* 456 U.S. 728, 735 (1982) (citing *United States v. Hopkins,* 427 U.S. 123, 126 (1976) (per curiam)); *accord Kania v. United States,* 650 F.2d 264, 268 (Ct. Cl. 1981) (noting that "[a] contract between [the] government and one of its employees is possible," but only if it is "specifically spelled out as a contract" and "made by a person having authority"). However, it is presumed that "absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government." *Chu v. United States,* 773 F.2d 1226, 1229 (Fed. Cir. 1985). Consequently, if an individual's "employment was by 'appointment,' a breach of contract action against the government would be precluded." *Hamlet v. United States,* 873 F.2d 1414, 1417 n.5 (Fed. Cir. 1989). In other words, a federal employee's "relationship with the Government cannot be simultaneously governed by both an appointment and a contract." *Collier v. United States,* 56 Fed. Cl. 354, 356 (2003), *aff'd,* 379 F.3d 1330 (Fed. Cir. 2004). To determine

how an individual is employed by the federal government, a court must analyze the relevant statutes and regulations in light of the other evidence presented. *See Hopkins*, 427 U.S. at 130.

D. Statutory Context

Employment in the federal government's civil service system is governed by title 5 of the United States Code. *Scarnati v. Dep't of Veterans Affairs*, 344 F.3d 1246, 1247 (Fed. Cir. 2003). The civil service "consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States," 5 U.S.C. § 2101 (2006), including positions in the competitive service and the excepted service, *id.* §§ 2102-2101 *See also id.* § 2105(a)(1) (noting that an "employee" in the civil service is "appointed"). The competitive service generally consists of all positions in the executive branch except those that are specifically excluded by statute. *Id.* § 2102(a). And, the excepted service generally consists of those positions that are not in the competitive service. *Id.* § 2103(a).

Congress created the TSA in 2001 to, among other things, shift the responsibility for screening airline passengers and their baggage to employees of the federal government. Aviation and Transportation Security Act, Pub. L. No. 107-71, §§ 101, 110, 115 Stat. 597, 597-604, 614-16 (2001) (codified as amended at 49 U.S.C. §§ 114, 44901 (2006)). Congress authorized the head of the TSA to, "[n]otwithstanding any other

provision of law, . . . employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals . . . necessary to carry out the screening functions" of the TSA. 49 U.S.C. § 44935 note; *accord id.* § 114(m)(1) (citing 49 U.S.C. § 106(*l*)(1)). It also authorized the TSA to use, with appropriate modifications, the personnel management system of the Federal Aviation Administration ("FAA"). *Id.* § 114(n) (citing 49 U.S.C. § 40122). The statute governing the FAA's personnel management system provided that the "provisions of title 5 shall not apply" to the system, "with the exception of . . . *chapters 83-85,* 87, and 89, relating to retirement, unemployment compensation, and insurance coverage[.]" *Id.* § 40122(g)(2)(G) (emphasis added).

Chapters 83 and 84 of title 5 concern, respectively, the Civil Service Retirement System ("CSRS") and the Federal Employees' Retirement System ("FERS"). Both of these chapters provide that if an annuitant is reemployed in an appointive position in the federal government, his or her pay is reduced by the amount of the annuity. *See* 5 U.S.C. §§ 8344(a) (CSRS), 8468(a) (FERS). However, both chapters also permit federal agencies to seek waivers of the annuity reduction provision from the OPM. *Id.* §§ 8344(i) (CSRS), 8468(f) (FERS). Waivers can be granted on a case-by-case basis if "there is exceptional difficulty in recruiting or retaining a qualified employee" for the position or if there is "an emergency involving a direct threat to life or property or other unusual

circumstances." *Id.* §§ 8344(i)(1) (CSRS), 8468(f)(1) (FERS); *see also* 5 C.F.R. part 553 (2007) (containing the regulations implementing the waiver provisions).

In 2002, Congress transferred the TSA to the newly formed Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 403, 116 Stat. 2135, 2178. The Department of Homeland Security, like the TSA before it, was authorized to create its own human resources management system. *Id.* § 841, 116 Stat. at 2229-34 (codified at 5 U.S.C. § 9701). Also like the TSA, the Department of Homeland Security was prohibited from overriding chapters 83 and 84 of title 5. *Id.* Accordingly, absent a waiver from the OPM, annuitants hired by the TSA or the Department of Homeland Security are subject to a reduction of pay in the amount of their annuities. With this statutory backdrop, the court turns to the specific and unfortunate circumstances of this case.

III. DISCUSSION

As noted above, plaintiff contends that because he had entered into an employment contract with the TSA that was breached by that agency, this court possesses jurisdiction over his complaint. Accordingly, the decisive issue in this case is whether plaintiff served in the TSA by appointment or by contract. As dictated by the controlling precedent, the court begins its analysis by examining the facts in light of the relevant statutes.

A. Plaintiff's Employment with the TSA Was by Appointment, Not Contract

Plaintiff was hired by the TSA under the authority of the Aviation and Transportation Security Act.[4] With limited exceptions that are not relevant here, this statute expressly requires security screeners to be federal employees as defined in title 5 of the United States Code. *See* 49 U.S.C. § 44901 (citing 5 U.S.C. § 2105). The pertinent section of title 5 provides that federal employees are appointed to their positions. 5 U.S.C. § 2105(a)(1). Although the Aviation and Transportation Security Act indicates that the head of the TSA may both "employ" and "appoint" security screeners, which conceivably provides the TSA with the option to hire the security screeners by contract, "this option does not overcome the presumption of appointment. . . ." *Calvin*, 63 Fed. Cl. at 473. Thus, the relevant statutes strongly suggest that plaintiff held an appointive position with the TSA.

---

[4] Plaintiff suggests that he was not hired directly by the TSA, but was instead hired by a third party retained by the TSA to find qualified applicants. There is no evidence in the record supporting this suggestion. The court notes that when the TSA was created in 2001, it "undertook to perform all passenger screening operations beginning on November 19, 2002," and to "build up the necessary workforce," the TSA retained a number of outside companies "to hire screeners." *Calvin v. United States*, 63 Fed. Cl. 468, 470 (2005). However, plaintiff did not seek employment with the TSA until December 2005.

Other evidence before the court fully supports this conclusion. Plaintiff's qualification letter specifically stated that he had completed the requirements for "appointment" as a Transportation Security Officer and his offer of employment was for a "contingent appointment." These letters are devoid of language evidencing a contract of employment. Further, the SF-50 issued by the TSA upon plaintiff's hiring indicated that plaintiff was appointed to the excepted service, that he had executed an appointment affidavit, that he served at the will of the appointing officer, and that his appointment included a two-year trial period. Thus, the language of the SF-50 explicitly reflects the appointive nature of plaintiff's employment. *See also Horner,* 803 F.2d at 693-94 (noting that an executed SF-50 is one of the "usual indicia of civil service status" and is a necessary element of an employee's appointment).

Plaintiff's circumstances are similar to those of TSA security screener plaintiffs in other cases. For example, in *Calvin*, seven of the plaintiffs were purportedly promised higher base salaries than what was typically paid by the TSA to its screeners. 63 Fed. Cl. at 470. Although these plaintiffs received offers of conditional appointment setting forth those higher salaries, they ultimately received actual appointments providing for salaries at the normal lower rate. *Id.* The plaintiffs argued that they were entitled to the higher salaries because the offer letters were binding contracts that were breached by the TSA by paying them at a lower rate. *Id.* at 471. The Court of

Federal Claims, analyzing the Aviation and Transportation Security Act, as well as the plaintiffs' offers of conditional appointment, appointment affidavits, and SF-50s, held that the plaintiffs had not overcome the presumption of appointment and that, therefore, the lower salaries applied.[5] *Id.* at 472-73.

Similarly, the TSA security screener plaintiff in *American Federation of Government Employees Local 1 v. Stone* alleged that he did not receive the salary set forth in his conditional appointment letter. 342 F. Supp. 2d 619, 621 (N.D. Tex. 2004). After remand by the United States Court of Appeals for the Fifth Circuit, the district court, using the same legal standards that the court applies in this case, rejected the screener's breach of contract claim and concluded that neither the relevant statutory language nor the conditional offer of appointment explicitly indicated that the screener was a contract employee. *Am. Fed'n of Gov't Employees Local 1 v. Stone,* No. Civ. 3:04-CV-1219-H, 2005 WL 2333620, at *1 (N.D. Tex. Sept. 23, 2005). Specifically, the court held that "[n]o explicit mention of a contractual relationship is made in the

---

[5] The court also concluded that discovery would not be material to the "pivotal issue" of whether the plaintiffs served by appointment or contract. *Calvin,* 63 Fed. Cl. at 474; *accord Federico v. United States,* 70 Fed. Cl. 378, 386 (2006) ("No amount of discovery could change the legal reality underlying plaintiff's claim that federal employees who serve by appointment may not bring contract claims regarding government positions held by appointment."). Similarly, to the extent that plaintiff seeks discovery here, his request is denied.

relevant statute" and that it was "undisputed" that the screener's "conditional offer of employment indicated that it was one of conditional appointment and did not explicitly indicate that [the screener] was hired as a contract employee." *Id.*

It is readily apparent that the decisions in *Calvin* and *American Federation of Government Employees Local 1* support the court's conclusion – dictated by the relevant statutes and the evidence proffered by the parties concerning plaintiff's employment with the TSA – that plaintiff was employed with the TSA by appointment, and not by contract.[6] However, for the sake of completeness, the court addresses the other arguments raised, either expressly or by implication, by plaintiff.

B. No Cognizable Claim of Misrepresentation Exists

First, plaintiff contends that like the TSA security screener plaintiffs in *Calvin* and *American Federation of Government Employees Local 1*, he was

---

[6] Although plaintiff attempts to distinguish *Calvin*, *American Federation of Government Employees Local 1*, and other decisions on the basis of his probationary status, such a distinction is of no import. Appointees who terminate their employment during a trial period are not retroactively rendered contract employees; they are still deemed to have been appointed to their positions. Indeed, plaintiff's initial SF-50 indicated that plaintiff was both appointed to his position and required to serve a two-year trial period.

intentionally misled by the TSA regarding the terms of his employment during the hiring process. Specifically, plaintiff alleges that TSA personnel "lied" or "did not tell the truth" to him during the hiring process. Opp'n 4; Surreply 3-4. Claims based on misrepresentation, like those advanced by plaintiff, sound in tort. *See Fla. Keys Aqueduct Auth. v. United States,* 231 Ct. Cl. 911, 912 (1982) (noting that claims based on false representation and deceit sound in tort); *Elkins v. United States,* 229 Ct. Cl. 607, 608 (1981) (holding that claims based upon deception, falsification, misrepresentation, and concealment sound in tort); *Somali Dev. Bank v. United States,* 508 F.2d 817, 821 (Ct. Cl. 1974) (explaining that claims based on negligent misrepresentation and wrongful inducement sound in tort). However, "[i]f contractual relations exist, the fact that the alleged breach is also tortious does not foreclose Tucker Act jurisdiction." *Fountain v. United States,* 427 F.2d 759, 761 (Ct. Cl. 1970) (per curiam); *see also Fla. Keys Aqueduct Auth.*, 231 Ct. Cl. at 912 (noting that when "there is privity of contract," allegations of false representation and deceit "often ha[ve] a contract as well as a tort aspect," and that as a result, the court possesses subject matter jurisdiction). Put another way, "[w]here . . . a claim is based on a breach of contract[,] it is properly within the jurisdiction of this court even though it also alleges that defendant engaged in tortious conduct in breaching the contract." *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 745 (1980).

In the instant case, the court has concluded that plaintiff was not contractually employed by the TSA. Thus, there can be no tortious breach of contract. Further, to the extent that plaintiff is pursuing an independent claim based on the TSA's alleged misrepresentations, plaintiff's claim sounds in tort and the court lacks jurisdiction to entertain it. *See* 28 U.S.C. § 1491(a)(1) (excluding claims sounding in tort from the jurisdiction of the Court of Federal Claims); *Alves v. United States*, 133 F.3d 1454, 1459 (Fed. Cir. 1998) ("To the extent that . . . allegations sound in tort, the Court of Federal Claims lacks jurisdiction under the Tucker Act. . . .").

C. Plaintiff's Appointive SF-50 Is Valid

Next, plaintiff attempts to mitigate the effect of the contents of the initial, appointive SF-50 by suggesting that the form is fabricated or otherwise invalid. In support of this suggestion, plaintiff first contends that he never received a copy of the SF-50 and that the TSA's failure to provide him a copy of the SF-50 rendered it invalid. He then contends that the SF-50 must have been fabricated because the statements made by TSA personnel during the hiring process implied the existence of a waiver of the requirement that his pay be reduced by the amount of his retirement annuity – a contention that he argues is supported by Mr. Dhenin's statements. Neither of plaintiff's contentions constitutes evidence that the SF-50 is invalid.

1. The TSA's Purported Failure to Provide Plaintiff With an Appointive SF-50 Does Not Invalidate the SF-50

According to the procedures adopted by the OPM, agencies are required to provide newly hired employees with a copy of the SF-50 reflecting their appointment. U.S. Office of Personnel Mgmt., *Guide to Processing Personnel Actions* §§ 1-3(b)(1), 4-7 (2009), http://www.opm.gov/feddata/gppa/gppa.asp. However, as the United States Court of Appeals for the Federal Circuit noted in *Hardy v. Merit Systems Protection Board,* an SF-50 "is merely an administrative record of the accomplished action." 13 F.3d 1571, 1575 (Fed. Cir. 1994). Thus, the issuance and receipt of an SF-50 is not the linchpin to federal employment. *See Grigsby v. U.S. Dep't of Commerce,* 729 F.2d 772, 775 (Fed. Cir. 1984) (noting that "while an employee's appointment cannot exist without execution of the appropriate appointment form," the execution of such a form is not "a controlling or sufficient element of the appointment"). In the present case, assuming plaintiff is correct that he did not receive the appointive SF-50, the facts demonstrate that the TSA's failure to provide plaintiff with the form did not preclude plaintiff from beginning work or receiving pay. Therefore, it is logical to presume that the TSA actually issued the SF-50, even if it did not provide a copy of it to plaintiff. *Cf. U.S. Postal Serv. v. Gregory,* 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"). Accordingly, the fact that plaintiff did not

receive a copy of the SF-50 does not render the SF-50 invalid.

2. No Implied-In-Fact Contract Exists That Invalidates the SF-50

Nor is the SF-50 invalidated by the statements of TSA personnel implying that a waiver existed such that plaintiff's pay would not be offset by his retirement annuity. In essence, plaintiff alleges that the representations of TSA personnel constitute an implied-in-fact contract. "An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Hercules, Inc. v. United States,* 516 U.S. 417, 423 (1996) (quoting *Balt. & Ohio R.R. Co. v. United States,* 261 U.S. 592, 597 (1923)). Implied contracts with the United States can only be made by "an authorized agent of the government." *Trauma Serv. Group v. United States,* 104 F.3d 1321, 1326 (Fed. Cir. 1997); *accord City of El Centro v. United States,* 922 F.2d 816, 820 (Fed. Cir. 1990); *Kania,* 650 F.2d at 268. Moreover, parties entering into contracts with the United States bear the burden of determining whether the official purportedly acting on the United States' behalf has the requisite authority. *Fed. Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for

the Government stays within the bounds of his authority."). There is no evidence in this case that an employee of the TSA with the authority to bind the government informed plaintiff that he had been granted a waiver of the retirement annuity offset provisions.

Plaintiff's situation here is analogous to that of the plaintiff in *Troutman v. United States*, 51 Fed. Cl. 527 (2002). In *Troutman,* the plaintiff was repeatedly reassured by the local personnel representative of the hiring agency – the Immigration and Naturalization Service ("INS") – that a waiver had been obtained that would exempt his pay from a reduction in an amount equal to his federal retirement annuity. *Id.* at 529. The court recounted the plaintiff's allegations:

> In his complaint, plaintiff alleges that prior to accepting his position with INS, he spoke with Ms. Judy Forgey in the local INS personnel District Office in Houston, Texas to inquire whether "his status as a retired Internal Revenue Service (IRS) employee would cause any problem with his annuity or his pay." The plaintiff states that he was advised by Ms. Forgey that "the INS had secured a waiver to hire retired Civil Service Employees, and that there would be no problem." After accepting and commencing employment as a temporary employee at INS, and after hearing that someone from the INS District Office in Dallas was inquiring regarding his annuity payments, the plaintiff again inquired of Ms. Forgey whether a

> waiver had been obtained which would exempt his pay from the annuity payment deduction of section 8344(a). According to plaintiff's complaint, once again, she informed him that "a waiver had been obtained for him and that no problem existed."
>
> Also according to the plaintiff, when he began his position as a temporary INS District Adjudication Officer, he received his full pay as a GS-9, Step 10 employee for the fifteenth through twentieth pay periods of 1996. Commencing on the twenty-first and twenty-second pay periods of 1996, the INS began deducting from plaintiff's paycheck the amount he was due to receive under his retirement annuity. After discovering the deduction, the plaintiff twice contacted Ms. Forgey. Subsequently, according to the plaintiff, Ms. Forgey informed him that the INS had secured a waiver for reemployed INS annuitants, but not reemployed IRS annuitants or other retired federal agency annuitants. Thereafter, plaintiff promptly resigned from his position.

Id. at 529-30. The court held that the plaintiff was "not entitled to rely on the apparent authority" of the local personnel representative regarding the existence of a waiver and that, consequently, the local personnel representative's statements did not convert the plaintiff's appointment, as reflected in an SF-50, into an express or implied-in-fact contract for

employment.[7] *Id.* at 535. If the facts in *Troutman,* where the plaintiff was specifically advised by the INS that he had been granted a waiver by the agency prior to his acceptance of employment, failed to establish the existence of an implied-in-fact contract that trumped an appointive SF-50, then it is axiomatic that the facts here cannot. Unlike the plaintiff in *Troutman,* plaintiff in this case first learned about the TSA's historical use of waivers from Mr. Dhenin after he resigned from the TSA. Thus, plaintiff cannot establish an implied-in-fact contract that invalidates his appointive SF-50.

D. The Oral Representations of TSA Personnel Are Not Contracts

Moreover, like the plaintiff in *Troutman,* plaintiff here is precluded from relying upon the oral representations made to him by various TSA officials that his retirement status would not affect his employment with the TSA. "Federal officials who by act or word generate expectations in the persons they employ, and then disappoint them, do not ipso facto

---

[7] The court in *Troutman* also held that "[t]he terms of the statute establishing the deduction for annuities when a retired Federal worker is reemployed, and the process to obtain waivers from that requirement, do not provide a cause of action for money damages." 51 Fed. Cl. at 532 (referring to 5 U.S.C. § 8344(a) and what is now 5 U.S.C. § 8344(i)(1)). Had plaintiff in this case alleged that 5 U.S.C. § 8344 or 5 U.S.C. § 8468 was money-mandating, the court would have similarly rejected his argument.

create a contract liability running from the Federal Government to the employee, as they might if the employer were not the government." *Shaw v. United States,* 640 F.2d 1254, 1260 (Ct. Cl. 1981). Rather, as with implied-in-fact contracts, express contracts with the United States, including employment contracts, must be executed on behalf of the United States by a person, having actual authority to do so. *Trauma Serv. Group,* 104 F.3d at 1325-26; *City of El Centro,* 922 F.2d at 820; *Kania,* 650 F.2d at 268; *see also Night Vision Corp. v. United States,* 469 F.3d 1369 (Fed. Cir. 2006) ("The elements of an implied-in-fact contract are the same as those of an oral express contract."). Plaintiff has not shown that any of the individuals who assured him that his retirement status would not affect his TSA employment had the actual authority to execute employment contracts on behalf of the United States or otherwise waive the requirements of 5 U.S.C. § 8344(a) or 5 U.S.C. § 8468(a). Accordingly, their oral representations do not constitute express or implied contracts and cannot, therefore, provide the basis for a breach of contract action.

E. Conclusion

In sum, both the relevant statutory language and the proffered documentary evidence demonstrate that plaintiff was appointed to his position at the TSA. To be sure, the court is sympathetic to plaintiff's circumstances. Plaintiff, a nonlawyer, exercised due diligence as best he could. He repeatedly sought

confirmation that his status as a federal retiree would not affect the terms of his employment. Moreover, the TSA personnel tasked with providing him information concerning federal employment assured him that his employment would not be affected by his retirement status. With this understanding, and for the sole purpose of TSA employment, plaintiff resigned his position with the Army at Fort Hunter Liggett, California and relocated to Gunnison, Colorado. It was not until after he began his TSA employment that he learned that his TSA pay would be reduced by his retirement annuity.

It is readily apparent that plaintiff was ill-served by the TSA personnel, who should be well-versed in the relevant law and should have informed plaintiff of the consequences of reentering the federal workforce as an annuitant. Nevertheless, the court is constrained by both the facts and the law. The relevant provisions of the Aviation and Transportation Security Act and title 5 of the United States Code, as well as the numerous documents describing plaintiff's employment as an appointment, dictate the conclusion that plaintiff was appointed; there was no separate contract of employment. Moreover, the law is well-settled that for plaintiff to receive his pay without an accompanying offset of his federal retirement annuity, the TSA was required to obtain a waiver. Unfortunately for plaintiff, the TSA did not do so. To mirror the statement of the court in *Calvin*, the "TSA apparently made the screeners promises that it could not keep, but this court is without

jurisdiction to compensate plaintiffs. . . . The plaintiffs should not have been treated so cavalierly, but as the court observed in *Shaw*, the plaintiffs' claims against the government are moral, not legal." 63 Fed. Cl. at 474-75.

IV. APPLICATION TO PROCEED *IN FORMA PAUPERIS*

Plaintiff filed, concurrent with his complaint, an application to proceed *in forma pauperis*. Pursuant to section 1915 of title 28 of the United States Code, courts of the United States are permitted to waive filing fees and security under certain circumstances.[8] *See* 28 U.S.C. § 1915(a)(1) (2006); *see also Hayes v. United States*, 71 Fed. Cl. 366, 366-67 (2006) (concluding that section 1915(a)(1) applies to both prisoners and nonprisoners alike). Plaintiffs wishing to proceed *in forma pauperis* must submit an affidavit that lists all of their assets, declares that they are unable to pay the fees or give the security, and states the

---

[8] While the Court of Federal Claims is not generally considered to be a "court of the United States" within the meaning of title 28, the court has jurisdiction to grant or deny applications to proceed *in forma pauperis*. *See* 28 U.S.C. § 2503(d) (2006) (deeming the Court of Federal Claims to be "a court of the United States" for the purposes of section 1915); *see also Matthews v. United States*, 72 Fed. Cl. 274, 277-78 (2006) (recognizing that Congress enacted the Court of Federal Claims Technical and Procedural Improvements Act of 1992, authorizing the court to, among other things, adjudicate applications to proceed *in forma pauperis* pursuant to section 1915).

nature of the action and plaintiffs' belief that they are entitled to redress. 28 U.S.C. § 1915(a)(1). Here, plaintiff submitted his application on a form supplied by the court for this purpose. He indicates that he has not been employed since June 2007, that he receives an unspecified amount of pension, annuity, or life insurance payments, that he has less than $1,300 in bank accounts, and that he owns a house that is currently appraised at $155,000. Although plaintiff does not disclose his current income from his pension, annuity, or life insurance on his application, as required, one exhibit to his complaint indicates that he received $8,650 from his retirement annuity in 2006 and another exhibit indicates that he receives a $435 monthly retirement annuity payment.[9] *See* Compl. Ex. 5 at 1; Compl. Ex. 7 at 2. The court is satisfied that plaintiff's apparently limited amount of retirement income, lack of employment, and small sum of liquid assets renders him unable to pay the filing fee.[10] *See also Hayes*, 71 Fed. Cl. at 369 ("The provision for waiving prepayment of filing fees provided by 28 U.S.C. § 1915 is not intended to take effect only after the applicant has exhausted all of his or her resources."). Accordingly, it grants plaintiff's application to proceed *in forma pauperis*.

---

[9] Plaintiff also failed to provide the required description of the nature of his action. However, because his complaint is sufficiently clear on this topic, the court finds the omission to be harmless.

[10] The court notes that defendant did not file an opposition to plaintiff's application to proceed *in forma pauperis*.

V. CONCLUSION

As set forth above, the court **GRANTS** plaintiff's application to proceed *in forma pauperis*, **GRANTS** defendant's motion to dismiss, and **DISMISSES** plaintiff's complaint for lack of jurisdiction. No costs. The clerk shall enter judgment accordingly.

IT IS SO ORDERED.

/s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

TSA GUIDE TO MAJOR ETHICS RULES

This is a brief guide to the rules of ethical conduct. The guide highlights the key rules contained in the *Standards of Ethical Conduct for Employees of the Executive Branch* and other laws. This guide is not comprehensive and the rules can sometimes be difficult to apply to particular situations. You are strongly encouraged to consult with TSA ethics officials for advice in any of the areas addressed below. Contact TSA ethics counsel (contact information on last page) with any questions regarding ethics rules. Check the TSA website for additional ethics information and guidelines.

FOURTEEN PRINCIPLES OF ETHICAL CONDUCT FOR FEDERAL EMPLOYEES

Authority – Executive Order 12674; ***Standards of Ethical Conduct for Employees of the Executive Branch*** (5 CFR Part 2635)

1. Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees shall not hold financial interests that conflict with the conscientious performance of duty.

3. Employees shall not engage in financial transactions using nonpublic government information or allow the improper use of such information to further any private interest.

4. An employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees shall put forth honest effort in the performance of their duties.

6. Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

7. Employees shall not use public office for private gain.

8. Employees shall act impartially and not give preferential treatment to any private organization or individual.

9. Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

10. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment that conflict with official Government duties and responsibilities.

11. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

The Tucker Act

The Tucker Act was passed in 1998. This law was a jurisdictional statute which expanded the scope of claims the Court of Claims could hear, but did not create any new substantive rights. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980). The Tucker Act did two things: (1) Plaintiffs could seek judgments against the federal government for claims based upon the U.S. constitution; (2) Circuit courts received concurrent jurisdiction with the Court of Claims for money damage claims of up to $10,000. In 1911, the jurisdiction of the circuit courts was transferred by Congress to the federal district courts.

In the Federal Courts Administration Act of 1992 (P.L. 102-572 § 902), the Court of Claims was renamed the Court of Federal Claims. The court is established under Article I, 28 U.S.C. § 171(a). The bench consists of sixteen judges, appointed by the president for terms of fifteen years. Procedure is in accordance with the Rules of the United States Claims Court, which are derived from the Federal Rules of Civil Procedure. Since 1982, the Court of Appeals for the Federal Circuit has is the route for an appeal from a court of Federal Claims ruling. 28 U.S.C. § 1295(a)(3).

It has jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or

for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. § 1491. As such, the Court of Federal Claims hears three main types of suites against the government: government contract disputes; Fifth Amendment takings claims; and claims for tax refunds. The Tucker Act waives sovereign immunity for such claims against the federal government. United States v. Mitchell, 463 U.S. 206 (1983). Generally, only money damages are available in a Tucker Act claim. United States v. King, 395 U.S. 1 (1969). The Court of Federal Claims must accept as binding precedent any decision published by the former Court of Claims. West Seattle Gen. Hospital, Inc. v. United States, 1 Cl. Ct. 745 (1983). The Court of Federal Claims lacks jurisdiction under the Tucker Act to hear tort claims against the federal government; such claims must be brought under the Federal Tort Claims Act. Indeed, until the passage of the FTCA, private bill was the continued method for bringing tort claims against the federal government.

Claim

The total amount of this claim is $234,805.00 plus $100,000.00 for a total of $334,805.00.

This amount was determined from the following:

If I had been told the truth at the start I would have kept my position for the next 5 years.

> Current job pay was $42,000/year x 5 years to include raises in cost of living and outstanding evaluation would equal around $220,000.
>
> If I stayed in the job instead retiring my retirement would have increased by $280.00 roughly times 12 years life expectancy is another $3,360.
>
> Relocation cost from California to Colorado was $6,500 and from Colorado to Arizona $4,945 for a total $11,445.00.
>
> Heart ship in this total mess is $100,000.

Case No.10-599

FEB 3 - 2011

In The
Supreme Court of the United States

MYRIAM ONYEABOR, *Petitioner*
Defendant and Third-Party Plaintiff
v.
CENTENNIAL POINTE
HOMEOWNERS'ASSOCIATION,
and LEBR & ASSOCIATES LLC., *Respondents*
Plaintiffs and Third-Party Defendants

On Petition from Utah Appellate Court

PETITION FOR REHEARING

Myriam Onyeabor,
Pro se
P. O. Box 22244
Salt Lake City, Utah 84122
Phone 801-556-0426

QUESTIONS PRESENTED

ISSUE: The Utah Appellate Court Denied Petitioner's Constitutional Due Process Guarantees, By Assuming Subject Matter Jurisdiction, and, By Allowing the Enforcement of the Restated CC&R.

Question # 1: Did The Appellate Court Deny Petitioner's Due Process Rights Pursuant To the Fifth and Fourteenth Amendments of the United States Constitution, By Assuming Subject Matter Jurisdiction, When the Litigation Was Initiated, by permanently Dissolved Association I? (Utah Code Ann. ¶ 42-2-10(1)

Question #2: Did The Utah Appellate Court Deny Petitioner's Constitutional Due Process Guarantees of Fifth and Fourteenth Amendments of the United States Constitution, By Allowing Association II and LEBR to Continue the Litigation Brought by Dissolved Association I? (Utah Code ¶ 48-2a-1002,)

Question #3: In the Light of *Bio-Thrust* (Utah App 2004), and *Phoenix* (Utah S CT 2002), whether, the Utah Appellate Court Misapplied or Abused Its Discretion by assuming subject matter Jurisdiction it lacked, and whether that Action led to violations of Petitioner's Fourteenth Amendment Due Process Guarantees of the United States Constitution?

Question #4: Did The Utah Appellate Court Deny Petitioner's Procedural and Substantive Due Process Rights of the Fifth and Fourteenth Amendments of The United States Constitution, When the Court found The Restated CC&R, Which Incorporates Violation of Mandatory laws and Petitioner's due process rights, to be valid and enforceable?

LIST OF PARTIES

MYRIAM N. ONYEABOR, *Petitioner.*
Defendant, Third-Party Plaintiff.
Hereafter known as Ms Onyeabor or Petitioner.

***FIRST* CENTENNIAL POINTE HOMEOWNERS' ASSOCIATION* Incorporated April 19th 2000, and permanently dissolved on September 27th 2001. Association I initiated this litigation, and was substituted for by Association II and LEBR & Associates LLC, September 15th 2005. *Hereafter, known as "Association I"*

SECOND CENTENNIAL POINTE HOMEOWNERS' ASSOCIATION, Plaintiffs and Third-Party Defendants, Incorporated November 29th 2004, after the onset of litigation and after Petitioner filed her motion to dismiss for lack of Jurisdiction.
Hereafter known as "Association II." *Respondent*

LEBR & ASSOCIATES LLC, a Utah corporation
Plaintiffs and Third-Party Defendants.
Hereafter known as "LEBR" *Co-Respondent*

TABLE OF CONTENTS

QUESTIONS FOR REVIEW. . . ii

LIST OF PARTIES. . . . iii

TABLE OF CONTENTS . . . iv

INDEX TO APPENDICES . . vi-vii

TABLE OF AUTHORITIES . . viii-xi

DEFINITION OF STATUTES, RULES, CODES, ORDINANCES, TREATIES, COVENANTS.

Section One: Definition of Rules, Codes & Ordinances. . . . . xii-xxii
Section Two: City and Utah Municipal Ordinances. . . . . xxii-xxiii
Section Three: Citation of Original and Restated CC&Rs . . . xxiii-xxiv

CONSTITUTIONAL PROVISIONS. . . xxiv

WHY REHEARING IS DESERVED. . xxv

OPINIONS BELOW 1

JURISDICTION OF US SUPREME COURT . 1

I STATEMENT OF THE CASE. . . 2

INTRODUCTION. 2

STATEMENT OF FACTS. . . . 3

(A) Questions #1-3: Petitioner's Fifth And Fourteenth Amendment Due Process Protections Were Denied Because of Utah Appellate Court's Lack Of Subject Matter Jurisdiction . 5

(B) Question # 4: Petitioner's Fifth And Fourteenth Amendment Due Process Guarantees Were Denied Due to The Enforcement Of The Restated CC&R 6

II REASONS FOR GRANTING REVIEW

(A) Questions #1-3: The Utah Appellate Court Lacked Subject Matter Jurisdiction. . . . 8

(1) Utah Code Ann. ¶ 42-2-10(1) Prohibits Unregistered Corporations from Suing. 8

(2) Respondents' plea to substitute based on Graham's Equity is misguided . . 9

(B) QUESTION #4: The Utah Appellate Court Found the Illegal Provisions in the Restated CC&R Enforceable, Thereby, Denying Petitioner's Procedural and Substantive Due Process Rights. . 9

CONCLUSION 14

INDEX TO APPENDICES

Appendix A: Utah Appellate Court Opinion Was Dated December 13th 2009

Appendix B: Utah Appellate Court's Opinion denying Petitioner's motion for Rehearing and Motion to supplement evidence was dated January 05, 2010.

Appendix C: Opinion of the Utah Supreme Court Denying Petitioner's Petition for A Writ of Certiorari Was Dated June 11th 2010

Appendix D: Salt Lake District Court Order for Substitution of Parties of September 15th 2005.

Appendix E: Salt Lake District Court's Order Granting Summary Judgment to Respondents Was Corrected and Dated January 28th 2008

Appendix F: Blank

Appendix G: Preservation of Issues

Appendix H: Constitutional & Statutory Provisions

Appendix I: Mr. Raile of LEBR's letter to Onyeabor dated July 11th 2002, acknowledging he participated in changing the CC&Rs.

Appendix J: Affidavit of Mr. Bezdijan

Appendix K: Salt Lake County Testimonies
K (1) Testimony by Mr. Wheelwright, Planning Commission Director
K (2) Testimony by the Salt Lake County.

K (3) the subdivision Permit

Appendix L (1): Petitioner's Motion to Dismiss

Appendix L (2): Petitioner's Reply to Motion to substitute Parties.

Appendix L (3): Respondents Answer and motion to substitute parties

Appendix M: THE PLAT MAP-
M (1) Focus on Building one
M (2) Reduced Image showing Outline
M (3) Dedications (right of Plat)
M (4) Public easements (left of Plat)

Appendix N: Affidavit of Alexander Udeh.
Appendix O: Affidavit of Myriam Onyeabor
Appendix P#1, P#2, P#3, P#4: Blockade of front doors, trailers, signs on Petitioner's buildings.

Appendix Q: Affidavit of James Walker

Appendix R: affidavit of Mr. Robert Mills

Appendix S: Affidavit of Mr. Travis Healey

TABLE OF AUTHORITIES

67 A.L.R.Fed. 937,4 Employee Benefits Ca 1112 , Pressroom Unions-Printers League Income Security Fund, v. Continental Assurance et al, ¶15, 700 F.2d 889 (1983 F. 2nd Cir.).. . . . 9

Amoco Production Company v. The United States of America (1980 10th Cir) 619 F.2d 1383¶14.. 11

Arbaugh v. Y & H Corp., 126 S. Ct. 1235. 546 U.S. 500(2006). 9, 14

Armstrong v. Manzo, 380 U. S. 545 (1965). . .14

Armstrong v. Homeowners Assoc. (NC S Ct 2006) 360 547, 561; 633 S.E.2d 78, 89. . . 13

Arndt v. First Interstate Bank, (1999 S Ct UT) ¶19¶24, 91 991 P.2d 584 5

Basso v. Utah Power & Light Co. 495 F 2d 906, 910 (1974). 9

BioThrust, Inc. v. Division of Corporations, 2003 UT App 360 P5, 80 P.3d 164, *cert. denied* 87 P.3d 1164 (Utah 2004) 2, 5

Bischoff v. Bletz, No. 07-001, 2008 VT 16; 949 A.2d 420; 2008 Vt. LEXIS 9 (Vt. 2008). . . 5

Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 241 (1897) . . 10

Cohens V. Virginia 19 U.S. 264, 404, ¶205-¶206, 5 L.Ed. 257, 6 Wheat. 264 (1821) **xxix**

Kenneth Craven v. Director, Office of Workers' Compensation 2010 WL 1660241 (5th Cir 2010) **5**

Dudley v. Easton, ¶13, 104 U.S. 99, 26 L.Ed. 668 (1881). **8**

Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist., 1999 UT App 136,¶¶10-12, 979 P.2d 363, 368 cert. denied, 994 P.2d 1271 (Utah 1999).. . . . . **5, 9**

Harper v. Great Salt Lake Council, Inc., (1999 S UT) 34, ¶ 14, 976 P.2d 1213 . . . . . **13**

Hatch v. Boulder Town Council, ¶ 9, ¶12, 21 P.3d 245, 248 (Utah App.2001) **10**

Joyce v. U.S., 474 F.2d 215, 219 (C.A.3 (Pa.), (1973). . . . . **xxviii, 5**

Levanger v. Vincent, (UT App 2000). ¶18, 103, 3 P.3d 187. . . . . **7**

*Medicare & Medicaid Guide P43, 957 Federal Recovery Services , Inc v. United States, ex rel, (*1995, 5th Cir) ¶31 72 F.3d 447 . **2**

Melo v. U.S., ¶ *27* 505 F.2d 1026, 1030 (1974). **8**

Merritt v. Hunter. ¶7, 170 F2d 739 (1948 10th Circuit). **11**

Miller, V. Celebration Mining Company, (Utah S Ct 2001). ¶ 26, 64; 29 p.3d 1231. . . . . **14**

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 320 (1950) . . . **11, 14**

Murphy v Crosland, 915 2d 491, 495 (UT 1996) **14**

Old Wayne Mutual Life Assoc. v. McDonough et al ¶9 204 U.S. 8, 15; 827 236. (1907) . . . **6**

Phoenix Indemnity. Ins. v. Smith, 49 ¶5 (Utah S CT 2002) **5**

Rhode Island v. Massachusetts, 37 U.S. 657, 718, 9 L.Ed. 1233 (1838). **9**

Sandy Valley. Associates v. Sky Ranch Estates (Nev. 2001) 117 Nev.948; 35 P.3d 964,968. . . **13**

Schroeder v. City of N. York, 371 U. S. 208(1962) **14**

Scott V. McNeal, 154 U. S. 34, 51 (1894) . **7, 14**

Springville Citizens v. Springville, (1999 S Ct UT) 25 P 30, 979 P. 2d ¶30. . . . . **10**

Sniadach v. Family Finance Corp., 395 U.S. 337, 41 (1969). . . . **14**

State v. Property at 2018 Rainbow Drive, ¶15-16 740 So. 2d 1025, 1028 (Ala. 1999). . . . **5**

Stines v. Willyng, INC., 81 N.C. 98, 101, 344 S.E.2D 546, 548 (N.C. 1986). **7**

Stop the Beach Renourishment, v. Fl. Department of Environ. ¶4 998 So. 2d 1102, (560 US, 2010). **14**

Utah Department. of Soc. Serv. v. Vijil, 784 P.2d 1130, 1133 (UT 1989). . .. 8

Weyeth Hardware & Manf. Co. v. James-Spencer-Batement. 15 Utah 110, 47 P. 604 (Utah 1897). 2

DEFINITION OF STATUTES, RULES, CODES, ORDINANCES, TREATIES, COVENANTS

Section One: DEFINITION OF RULES & CODES-Page **xi**
Section 2: COUNTY AND UTAH MUNICIPAL ORDINANCES- Page **xx**
Section Three: CITATIONS OF ORIGINAL AND RESTATED CC&RS- Page **xxiii**

Section One: DEFINITION OF RULES, CODES & ORDINANCES

**UCA: stands for Utah Code Annotated
**SLCCO stands for Salt Lake City County Ordinance

Federal Rule 17 (b) civil procedures:

(b) Capacity to sue or be sued...The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. **5**

Utah Rule of Civil proc. 17 (d)(d) Associates may sue or be sued by common name. When two or more persons associated in any business either as a joint-stock company, a o partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name **9**

Utah Rule of Civil proc. 23A (b) "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.". **5**

Utah Code Ann. ¶ 42-2-10. Penalties "Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with: (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, proceeding in any Courts of this state.". **2, 5, 9, 14**

Utah Code ann. ¶16-6a-204,formerly UCA 16-10a-204: "All persons purporting to act as or on behalf of a nonprofit corporation, knowing there is no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting." **6**

UCA 16-6a-825, "(2) except as otherwise provided in this section, upon the finding of a conflicting Interest transaction, in an action properly brought before it, a Court may: (a) rule that the conflicting interest transaction is void or voidable." . . **7**

Utah Code Ann. ¶ 48-2a-1002 (now 48-2c-1702, 2009). "In a derivative action, the plaintiff must be a partner at the time of bringing the action and: (1) must have been a partner at the time of the transaction of which he complains." . **5, 14**

Utah Code Ann. ¶ 10-9a-505

(1) (a) The legislative body may divide the territory over which it has jurisdiction into zoning districts of a number, shape, and area that it considers appropriate to carry out the purposes of this chapter.

(b) Within those zoning districts, the legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land.

(c) A municipality may enact an ordinance regulating land use and development in a flood plain or potential geologic hazard area to:

(i) protect life; and

(ii) prevent:

(A) the substantial loss of real property; or

(B) substantial damage to real property.

(2) The legislative body shall ensure that the regulations are uniform for each class or kind of buildings throughout each zoning district, but the regulations in one zone may differ from those in other zones 6

Utah Code Ann. ¶ 10-9a-602

(1) The planning commission shall:

(a) prepare and recommend a proposed ordinance to the legislative body that regulates the subdivision of land;

(b) prepare and recommend or consider and recommend a proposed ordinance that amends the regulation of the subdivision of the land in the municipality;

(c) provide notice consistent with Section **10-9a-205**; and

(d) hold a public hearing on the proposed ordinance before making its final recommendation to

the legislative body.

(2) The municipal legislative body may adopt or reject the ordinance either as proposed by the planning commission or after making any revision the legislative body considers appropriate.. .6

Utah Code Ann. ¶ 10-9a-302.

The planning commission shall make a recommendation to the legislative body for:

(1) a general plan and amendments to the general plan;

(2) land use ordinances, zoning maps, official maps, and amendments;

(3) an appropriate delegation of power to at least one designated land use authority to hear and act on a land use application;

5(b) (iii): participant to be heard in each public hearing on a contested application. . . 6

Utah Code Ann. ¶10-9-1001(3) (a) -Now **Utah Code Ann. ¶ 10-9a-801**

(1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

(2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.

(3) (a) The courts shall: (i) Presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and (ii) determine only whether or not the decision, ordinance, or regulation is

arbitrary, capricious, or illegal. . . . 10

Utah Code Ann. ¶ 57-8-6 "Each unit/Lot owner shall be entitled to the exclusive ownership and possession of his unit/Lot." . . . 4

Utah Code Ann. ¶ 57-8a-102(4) "Common areas" means property the association(a) owns; (b) maintains (c) repairs; or (d) administers." . 4

Utah Code Ann. ¶ 57-8-7. Common areas and facilities. (2) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentages or fractions expressed in the declaration. The declaration may allocate to each unit an undivided interest in the common areas and facilities proportionate to either the size or par value of the unit.
(3) Except as otherwise expressly provided by this act, the undivided interest of each unit owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of two-thirds of the unit owners expressed in an amended declaration duly recorded 4

Utah Code Ann. ¶ 57-8-41. Lender approval -- Declaration amendments and association action.
(1) If a security holder's consent is a condition for amending a declaration or bylaw, or for an action of the association of unit owners or management committee, then, subject to Subsection (4), the security holder's consent is presumed if:
(a) written notice of the proposed amendment or action is sent by certified or registered mail to the security holder's address listed for receiving notice in

the recorded trust deed or other recorded document evidencing the security interest;

(b) 60 days have passed after the day on which notice was mailed; and

(c) the person designated for receipt of the response in the notice has not received a written response from the security holder either consenting to or refusing to accept the amendment or action.. 7

Utah Code Ann. ¶ 70A-2-313): express warranty. (a) any affirmation of fact or promise made by the seller to the buyer... becomes an express warranty. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.(c) Any sample or model which is made part of the basis of the bargain creates an express warranty (2) **It is not necessary** to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty . . 13

Utah Code Ann. ¶ 16-6a-707 (formerly ¶ 16-6-61)

(1) Unless otherwise provided in the articles of incorporation and Subsection (5), and subject to the limitations of Subsection **16-6a-1704**(3), any action that may be taken at any annual or special meeting of members may be taken without a meeting and without prior notice, if one or more consents in writing, setting forth the action taken, are signed by the members having not less than the minimum **voting power that would be necessary to authorize or take the action at a meeting at which all members entitled to vote on the action were present and voted**.

(2) (a) Unless the written consents of all members entitled to vote have been obtained, notice of any member approval without a meeting shall be given at least 10 days before the consummation of the transaction, action, or event authorized by the member

(4) (a) A member action taken pursuant to this section is not effective unless all written consents on which the nonprofit corporation relies for the taking of an action pursuant to Subsection (1) are:

(i) received by the nonprofit corporation within a 60-day period; and

(ii) not revoked pursuant to Subsection (3).

(b) Action taken by the members pursuant to this section is effective:

(i) as of the date the last written consent necessary to effect the action is received by the nonprofit corporation; or

(ii) if all of the written consents necessary to effect the action specify a later date as the effective date of the action, the later date specified in the consents.

(c) If the nonprofit corporation has received written consents in accordance with Subsection (1) signed by all members entitled to vote with respect to the action, the effective date of the member action may be any date that is specified in all the written consents as the effective date of the member action .7

Utah code ann. 16-6a-1704(3): does not operate to permit a nonprofit corporation in existence prior to April 30, 2001, to take action by the written consent of fewer than all of the members entitled to vote with respect to the subject matter of the action, until the date a resolution providing otherwise is approved either: (a) by a consent in writing:

(i) setting forth the proposed resolution; and

(ii) signed by all of the members entitled to vote with respect to the subject matter of the resolution; or

(b) at a duly convened meeting of members, by the vote of the same percentage of members of each voting group as would be required to include the resolution in an amendment to the nonprofit corporation's articles of incorporation. . .7

Utah Code Ann 76-6-401¶ (4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement. 3

Utah Code Ann. 16-6a-611. No property right. A member does not have any vested property right including any right relating to management, control, purpose, or duration of the nonprofit corporation, except as provided by:(1) the bylaws of a mutual benefit corporation; or(2) other law. . 4

Penalty: UCA ¶ 10-9a-803(2):
(2) Violation of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter is punishable as a class C misdemeanor upon conviction either: (a) as a class C misdemeanor; (b) by imposing the appropriate civil penalty adopted under the authority of this section. 13

Utah Code Ann. ¶ 10-9a-608(b) If a petition is filed under Subsection (1)(a), the land use authority shall hold a **public hearing** within 45 days after the day on which the petition is filed if: (i) any owner within the plat notifies the

municipality of the owner's objection in writing within 10 days of mailed notification; or (ii) a public hearing is required because all of the owners in the subdivision have not signed the revised plat.. **6, 7**

Utah code Ann. 10-9a-404. Public hearing by planning commission on proposed general plan or amendment

(1) (a) After completing its recommendation for a proposed general plan, or proposal to amend the general plan, the planning commission shall schedule and hold a public hearing on the proposed plan or amendment.(b) The planning commission shall provide notice of the public hearing, as required by Section **10-9a-204**.(c) After the public hearing, the planning commission may modify the proposed general plan or amendment.

(2) The planning commission shall forward the proposed general plan or amendment to the legislative body.

(3) The legislative body may make any revisions to the proposed general plan or amendment that it considers appropriate.

(4) (a) The municipal legislative body may adopt or reject the proposed general plan or amendment. **6**

Utah Code Ann. 10-9a-204. Notice of public hearings and public meetings to consider general plan or modifications.

(1) Each municipality shall provide:

(a) notice of the date, time, and place of the first public hearing to consider the original adoption or any modification of all or any portion of a general plan; and

(b) notice of each public meeting on the subject.

(2) Each notice of a public hearing under

Subsection (1)(a) shall be at least 10 calendar days before the public hearing and shall be:

(a) (i) published in a newspaper of general circulation in the area; and

(ii) published on the Utah Public Notice Website created in Section **63F-1-701**;

(b) mailed to each affected entity; and

(c) posted:

(i) in at least three public locations within the municipality; or

(ii) on the municipality's official website.

(3) Each notice of a public meeting under Subsection (1)(b) shall be at least 24 hours before the meeting and shall be:

(a) (i) submitted to a newspaper of general circulation in the area; and

(ii) published on the Utah Public Notice Website created in Section **63F-1-701**; and

(b) posted:

(i) in at least three public locations within the municipality; or

(ii) on the municipality's official website. . **6**

Section 2: CITY AND UTAH MUNICIPAL ORDINANCES

SLCCO ¶18.20.040 Lots. (B). All lots shown on the preliminary and final plats must conform to the minimum requirements of the zoning title, if any, for the zone in which the subdivision is located, and to the minimum requirements of the health department for water supply and sewage disposal. . **13**

County Ordinance. ¶17.80.050 (L): Once the overall development plan has been approved by the

county commission, no changes or alterations to such plan shall be made without first obtaining approval of the county commission.. . . . 7

SLCCO ¶19.78.150

B. Amendments to approved plans and specifications for a planned unit development shall be approved by the planning commission and shown on the approved plans. . . . **6, 7**

SLCCO¶20.24.030 H. "The side lines of all easements shall be shown by fine dashed lines. The widths of all easements and sufficient ties thereto to definitely locate the same with respect to the subdivision shall be shown. All easements shall be clearly labeled and identified." . . **12**

SLCCO ¶ 20.36.020 "It shall be unlawful for any person to fail to comply with the provisions of this title, and failure to comply with the provisions of this title shall constitute a class C misdemeanor." **13**

SLCCO ¶ 21A.28.020: M-1 Light Manuf. District: **B.** Uses: Uses in the M-1 light manufacturing district as specified in section 21A.28.040, "Table of Permitted and Conditional Uses for Manufacturing Districts", of this chapter are permitted subject to the general provisions set forth in section 21A.28.010 of this chapter.**C.** Lot size 1. Minimum Lot Area: Twenty thousand (20,000) square feet. . . **4**

SLCCO ¶21A.54.100: Penalty. Selling property with lot sizes below the approved lot size of 20,000 sq ft or Lot size allowed under a conditional use permit or any other violation of the permit would lead to the revocation of the permit. **4**

Section Three: CITATION: ORIGINAL AND RESTATED CCOVENANTS & RESTRICTIONS

All cited Original and Restated CC&Rs are located at Appendix I (3)

Original CC&R ¶1.5 (a) "common areas are the property and interest therein, excluding the lots. .2

Restated ¶ CC&R 1.6: "Common element shall mean all utility lines, lighting, not attached to the building, fences, landscaping, parking spaces, load/receiving areas and other portions of the property other than the buildings." Therefore, lot is building only 11

Original CC&R ¶1.9: Lot is "Separate space within the property intended for independent use and occupancy . . . designated as Lot on the Plat... Each Lot shall include its appurtenant percentage interest in the common areas." . . . 11

Original CC&R ¶ 3.1 "The Plat shows each Lot. It's Lot number, location, size and dimensions." 11

Original CC&R 4.1: Lot: "Estate of an owner. Each owner shall own fee simple title to its lot(s)." 4

Restated ¶ CC&R 4.1: Lot "Estate of an owner. Each owner shall own fee simple title to its lot(s)." 4

Restated CC&R 7.1, "The Association, subject to the rights of the Owners set forth in Article IV hereof, shall be responsible for the exclusive management, control, maintenance and repair of the Common Elements" . . 4

CONSTITUTIONAL STATUTORY PROVISIONS
(See full provisions at Appendix H)

*The Fifth Amendment of the United States Constitution

*The Fourteenth Amendment of the United States Constitution.

CERTIFICATE: REHEARING IS DESERVED

The dramatic development that made it imperative for Petitioner to file a Petition for Rehearing is that, in the meantime, Respondent LEBR has brought another lawsuit, which is an effort to further reap some benefit from the unjust ruling in this case. This new lawsuit is an effort to make up for the loss in their Cross appeal. To do nothing would put Petitioner in jeopardy of losing what is left of her property. The consequences, for both parties, would be a proliferation of lawsuits, whereas, if the United States Supreme Court were to review this case, both the cost of this litigation to the public, in the court system, as well as the cost to both parties, would be prevented. Petitioner is not filing for a Rehearing for the sake of delay, because she has put up much of what she owns, as collateral for the judgment, and is anxious to free her assets.

Additionally, the questions raised by this case concern some of the bedrock principles upon which this great nation is founded; the Fifth and Fourteenth Amendments Due Process guarantees of the United States Constitution. The right to be heard, before life, property or liberty is taken away, rises above all else and demands resolution in this case. When the Utah Appellate Court ignored such critical question of law, such as the court's lack of subject matter jurisdiction, the Utah Appellate Court, basically, left Petitioner no alternative but to seek redemption at the United States Supreme Court. Petitioner desperately prays the United States Supreme Court to review this case because, "Where there is no jurisdiction over the subject

matter, there is, as well, no discretion to ignore that lack of jurisdiction,"Joyce.[1]

Petitioner's current issue is more succinct and "ripe" for the United States Supreme Court to comprehend and address. The one issue raised has more national ramifications than those in her initial petition. Though Petitioner does not have any Amicus Briefs in support, there is a great deal of interest in her struggle, at the local level, regarding her property rights. Finally, actions that attack the fundamental principles of the United States Constitution, by their very nature, invoke the jurisdiction of the United States Supreme Court, and, without reserve, ask for a fair review.[2]

Petitioner is not doing this appeal pro se because she views her property rights lightly; she, simply, does not have comparable wherewithal to those of the corporations out to get her property. Petitioner has both a right and a duty to protect her constitutional and property rights. The United States Supreme Court must go beyond the initial impression one gets upon reading the Utah Appellate opinion and, please, review this case. Petitioner has been treated unjustly, and would very much appreciate a review.

_____/s/_____
Myriam Onyeabor, Petitioner.

---

[1] *Joyce v. U.S.*, ¶19, 474 F.2d 215, 219 (C.A.3 (Pa.), 1973).

[2] *Cohens V. Virginia* 19 U.S. 264, 404, ¶205-¶206,(1821) "Suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution., ...unless the jurisdiction of this court might be exercised over it, **the Constitution would be violated... Questions may occur, which we would gladly avoid; but we cannot avoid them...**"

OPINIONS, ORDERS IN THE LOWER COURTS

(A) Utah Appellate Court opinion of Dec. 13th 2009

(B) Utah Appellate Court order denying Petitioner's motion for Rehearing January 5th 2010.

(C) Opinion of Utah Supreme Court denying Writ of Certiorari, June 11th 2010

(D) Salt Lake District Court order for substitution of parties September 15th 2005

(E) Salt Lake District Court's order granting summary judgment, Jan. 28th 2008

JURISDICTION: The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C ¶ 1257(a). Respondents filed a motion for summary judgment, October 30th 2006 Petitioner appealed the ensuing judgment, which the Appellate Court affirmed December 13th 2009. Petitioner's petition to Utah Supreme Court for Writ of Certiorari (aka, "Writ") was denied June 11th 2010. Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied January 10th 2011. Petitioner now files a petition for Rehearing.

GROUNDS: Pursuant to Federal Rule of Civil Procedure, Rule 10(c) "a state court or a United States Court Of Appeals has decided an important question of Federal Law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court." The Court could apply Rule10 (b), if the court decides to address Question #3.

I STATEMENT OF THE CASE

INTRODUCTION

By one stroke of the pen, one court order, the Utah Appellate Court illegally resuscitated Association I, a permanently dissolved Utah non profit corporation, when the court adjudicated this litigation that the original Plaintiff, Association I, had brought, post mortem, four years after it was legally dissolved. Pursuant to Utah Code Ann. ¶ 42-2-10(1),[3] Association I was statutorily barred from suing in Utah courts.

Questions # 1-3: Petitioner asserts that her Due Process protections were denied when the Utah Appellate Court presided over fictional claims brought by defunct Association I, "a mere creature of laws,"[4] revived by an illegal substitution of Respondents, see *Medicare.*[5] Petitioner has been subjected to a long litigation, a determined effort to force Petitioner to relinquish her property rights, whereas, her 2004 motion to dismiss should have been granted.[6] "No corporation so dissolved may be revived," *BioThrust.*[7]

---

[3] Utah Code Ann.¶ 42-2-10(1). Unregistered entities (1) **shall not sue,** prosecute, or maintain any action, suit, counterclaim, cross complaint, proceeding in any... Courts of this state

[4] *Weyeth Hardware v. James-Spencer* (Utah 1897).15, 110, 47 P. 604

[5] *Medicare & Medicaid Guide v. United States ex rel,* (1995, 5th Cir) ¶31 72 F.3d 447. "Where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint by substituting new plaintiffs."

[6] Preserved: See Petitioner's Rule 12(b)(l) motion to dismiss, Appendix L (1). Respondents' *motion to substitute parties,* Appendix L(3) Petitioner's *Reply memorandum,* Appendix L(2)

[7] *BioThrust, Inc. v. Division of Corporations,* 2003 UT ¶8 ¶14, 360 P5, 80 P.3d 164,

By that same stroke of its pen, the Utah Appellate Court denied Petitioner's Fourteenth and Fifth Amendment Due Process rights by finding the Restated CC&R to be valid. The judgment was awarded to a phantom litigant (Association I), in whose name, Petitioner's property has been illegally appropriated by LEBR. Question #4,[8] centers around the creation and enforcement of the Restated CC&R, which illegally force, absent due process, dual and competing ownerships claims on Petitioner's private property. The Utah Appellate action constitutes a "private taking,"[9] and a denial of due process.

Question # 4 does not require the United States Supreme Court to make any initial determination as to whether the property belongs to Petitioner, thus, quieting any allegations of conflict, or that the issues are too "intertwined" with state law as to preclude United States Supreme Court's review. The Utah Appellate opinion (Appendix A, Page 4) already made the determination that Petitioner owns her lots, "fee simple" and "as described on the recorded Plat" - **an absolute, established** ownership. The Court's subsequent determination that the association 'owns' and controls portions of those same Lots is in dispute.

STATEMENT OF FACTS

The matter before the United States Supreme Court arises out of a dispute on Centennial Pointe, a commercial real estate, a Planned Unit, platted [10] with seven Lots, in the M-1 zoning district. The subdivision

---

[8] Preser: Opening Brief Chap V-VII; "Writ," to Utah S Ct chap II

[9] Utah Code Ann. 76-6-401 (4): theft by conversion, private taking.
* Preserved: "Writ" to Utah Supreme Court, chapter 1(A).

[10] see Plat, Appendix M (1), M (2), M (3), M (4)

has two resident owners (Petitioner, and LEBR), and one absentee owner. Based on the Plat,[11] Sanborn sold lot 1 to Petitioner, April 24th 2000; lots 4,-7 to Bezdijan, August 23rd 2000; lot 2 to Petitioner Sept. 28th 2000; and lot 3 to LEBR November 24th 2000. Petitioner's Lot 1 measures 23,834 sq. ft. and Lot 2, 15, 553 sq. ft. She owns the area "exclusively,"[12] and "fee simple,"[13] in contrast to ownership over "common areas,"[14] On August 24th 2000, the developer and, by admission, Raile of LEBR, changed the CC&R (Covenants, Conditions and Restrictions) from "Original" (April 2000) to the "Restated." The Restated CC&R installed "common areas" on about 75% of Petitioner's Lots, and with it, Association's "exclusive control," and implied ownership.[15] No legal requirements were met. Thereafter, LEBR began blockading Petitioner's property,"[16] subjecting Petitioner and her tenants to one assault and constant harassment, right on her property.[17] In 2004, LEBR filed a breach of contract claim, to enforce the Restated CC&R on Petitioner, which translates into an "adversarial taking" of her private property, by LEBR.

---

[11] Permit at Appendix K (3). SLCCO ¶ 21A.28.020: M-1 Zoning requirement 20,000 sq ft. Lots Penalty: SLCCO ¶21A.54.100

[12] UCA ¶ 57-8-6, "Each unit [Lot] owner shall be entitled to **exclusive ownership** and possession of his unit."

[13] Original CC&R and Restated CC&R 4.1: "Estate of an owner. Each owner shall own **fee simple** to its Lot(s)"

[14] UCA. ¶ 57-8a-102 (4): "Common areas means property the association (a) owns; (b) maintains. See, also, UCA ¶ 57-8-7(2).

[15] Appendix I, ¶ 14 and ¶ 17 see also, Restated CC&R at 7.1.

[16] See Appendix P #1-4. see also Utah Code Ann. 16-6a-611

[17] See court order Appendix E, Page 9(L) & Appendix Q (¶2-¶18).

(A) Questions #1-3: PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS GUARANTEES WERE DENIED BECAUSE UTAH APPELLATE COURT LACKED SUBJECT MATTER.

The Utah Appellate Court went against its principle in *BioThrust,* and Utah Supreme Court precedent in *Phoenix.*[18] The *Biothrust,* [19] Court held, ¶3: "Bio-Thrust had one year... [to] seek reinstatement. ¶14: Petitioner's failure to establish standing leaves no choice but to dismiss the appeal." This is identical to Association I. Additionally; Association II (created after onset of litigation) lacked standing as a substitute,[20] Utah Code Ann. 48-2a-1002. Federal Rule of Civil Procedure, 17(b) provides, "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Therefore, Respondents are subject to UCA.¶ 42-2-10(1), not equity. The Utah Appellate Court "has no discretion to ignore [its] lack of jurisdiction," *Joyce.*[21] To bestow LEBR with Association-specific power is to change the roles of the covenanting parties, *Graham.*[22] See, *Arndt,*[23]

---

[18] *Phoenix Indemnity. Ins. v. Smith,* 49 ¶5 (Utah S CT 2002)

[19] *BioThrust, Inc. v. Division of Corporations,* (2003 UT App) ¶3, ¶14, 360P5, 80 P.3d 164 (Citations Omitted).

[20] District order, Appendix D. Appellate, Appendix A, Page 5

[21] *Joyce v. United States,* 474 F.2d 215, 219 (C.A.3 (Pa.), 1973

[22] *Graham v. Davis County Solid Waste Mgmt.*1999 UT App 136, .979 P.2d 363, 368, p18 and p 31.

[23] *Arndt v. First Interstate* Bank, (1999 S Ct UT) ¶19 ¶24, 91 991 P.2d 584. Utah law demands that LEBR bring a direct action. Preserved: "Writ" to Utah Sup Ct chapter VI; Appendix (L(2), *see* Utah Rule Civ.23A (b)

(B) QUESTION #4: PETITIONER'S DUE PROCESS RIGHTS WERE DENIED BY THE ENFORCEMENT OF RESTATED CC&R.

Whether Respondents violated substantive Utah laws and, subsequently, Petitioner's Due Process guarantees, in enforcing the Restated CC&R is no longer in question. The Salt Lake County,[24] the authority on land use matters, has affirmed that substantive laws were violated by the amendments.[25] Utah law provided safeguards, to ensure that change of ownership, "use", or rezoning of subdivisions, are not accomplished by such acts as the arbitrary creation of the Restated CC&R. Petitioner and all Utah Residents, rely upon the expectation that the laws are being enforced when they purchase property. The aforementioned illegal changes were made without due process, thus, betraying that trust.

Petitioner was denied due process on these levels: **(1)** By failing to inform existing owners, through written notices (Utah Code Ann. ¶ 10-9a-608(B), denying them an opportunity to oppose the changes. **(2)** By preventing the County, bound by law, from performing its duties. UCA.¶ 10-9a-608 (B) provides, "IF a petition is filed, land use authority shall hold a **public hearing** within 45 days." See UCA.¶10-9a-204 and ¶ 10-9a-404 for specifics. See, SLCCO 19.78.150 (B). Section ¶17.80.050 (L) provides: "Once the overall development plan has been approved, no alterations ...shall be made without approval of the County."

---

[24] Empowered under Utah Code Ann. ¶ 10-9a-505, UCA ¶ 10-9a-602; UCA ¶ 10-9a-302, all definitions above Page xii-xxiii

[25] See Appendix K (1), K (2), and K (3) and K (3).

(3) UCA ¶10-9a-608(B) (1) (ii) provides, "Public hearing is required because all owners in the subdivision **have not signed the revised plat."** The Existing Plat reflects the 'Original', not the 'Restated' CC&R; because changes in the Restated are not recognized by the County, Appendix K (2) and *Stines.*[26]

(4) By the fact that Utah nonprofit law requires members to **participate and vote**, *Levanger.*[27]

(5) UCA. ¶ 57-8-41 requires that Mortgage lenders give their **consent in writing** before changes. LEBR acknowledged this in 2002; [28] but had ignored it.[29]

(6) Sanborn's real estate agent testified,[30] at ¶15, "THE CC&R'S were changed at the request of Mr. Raile before Mr. Raile of LEBR bought his property, and as a condition to buying his own property from Mr. Sanborn." Therefore, Private property, already sold, was reclaimed, and conveyed to the association, to get LEBR to buy. In *Scott V. McNeal,* 154 U. S. 34, 51 (1894), Scott's property was sold when neighbors testified he was dead. The panel held, "divesting him of his property is a direct violation of constitutional guaranty." Similarly, Petitioner's property is being conveyed, renegotiated, while she is still alive.

---

[26] See, *Stines v. Willyng,* INC., 81 N.C. 98, 101, 344 S.E.2D 546, 548 (N.C. 1986). "A Plat Map referred to in deed becomes part of the deed, as if written therein."

[27] *Levanger v. Vincent,* 2000 UT ¶18, 103, 3 P.3d 187. "The Act's requirement that Association members act only at a duly called meeting protects members." See, UCA ¶16-6-61, ¶ 16-6a-1704

[28] Appendix I, ¶13 ¶14, and ¶16. Preserved: Reply Brief chap. V

[29] Mortgage lenders were ignored in creating Restated CC&R

[30] See affidavit of Robert Mills, appendix R ¶2-¶16.

II REASONS FOR GRANTING RELIEF

(A) UTAH APPELLATE COURT LACKED SUBJECT MATTER JURISDICTION

This is a unique opportunity for the United States Supreme Court to address violation of Petitioner's due process rights, when the Utah Appellate Court issued judgment on merits, while it lacked subject matter jurisdiction. That action contradicts the historic position of the United States Supreme Court on lack of jurisdiction, see *Dudley v. Easton*, ¶13, 104 U.S. 99, 26 L.Ed. 668 (1881) and *Old Wayne v. McDonough et al* ¶9 204 U.S. 8, 15; (1907).

"IF jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs." *Utah Dept. Of Soc. Services v. Vijil, UT 1989,* 784 P.2d 1130, 1133. Utah Appellate Court assumed jurisdiction in order to issue its judgment, which is unlawful, *Melo.*[31] To adjudicate this case, absent proper jurisdiction, further denies Petitioner due process. Jurisdiction, "must be decided, as any movement is exercise of jurisdiction," *Rhode Island v. Massachusetts,* 37 U.S. 657, (1838).

(1) Utah Code Ann. ¶ 42-2-10(1) Prohibits Unregistered Corporations from Suing

Utah Code Ann. 42-2-10(1) virtually dictates, that an unregistered corporate, **"SHALL not sue,** prosecute." Respondents are barred from pleading for the court's discretion, equity, or substitution. The Second Circuit held,[32] "IF jurisdiction is lacking at the

---

[31] *Melo v. U.S.*, ¶ 27 505 F.2d 1026, 1030 (1974)

[32] *67A.L.R.Fed.937,4 Employee Benefits Pressroom Unions Printers v. Continental Assurance et* ¶15, 700 F.2d 889 (1983 2nd Cir.)

commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim." In *Arbaugh v. Y & H Corp*, 546 U.S. 500 (2006), Justice Ginsburg, concluded that lack of standing, as in the case of Association I, does not allow the court any discretion, but the statutorily-based jurisdictional provisions might require some interpretation.

(2) Respondents' plea to Substitute Based on Graham's Equity is misguided.

Respondents mistakenly plead for *Graham*'s equity, "Plaintiff has admitted that **it was dissolved** - similar to unincorporated Association in *Graham*."[33] But, the *Graham* court (p 12, 368), while granting the motion to substitute, clearly discredited Respondents' claim, "IN this case, the Committee, as an **unincorporated** association falls within the purview of the "other association" of Rule 17(D)... in contrast, complaint in this case, was not filed by a party lacking capacity to sue." Association I lacked capacity to sue.

Petitioner has no other recourse but to come before the Supreme Court, and, humbly, ask for a review, based on law, and objective standards.

(B) QUESTION #4: THE UTAH APPELLATE COURT FOUND THE ILLEGAL PROVISIONS IN THE RESTATED CC&R ENFORCEABLE, THEREBY, DENYING PETITIONER'S DUE PROCESS RIGHTS

"NOR shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

[33] Respondents' motion to substitute, Appendix L (3) Page 2 3

equal protection of the laws." Fourteenth Amendment of the United States Constitution The Utah Appellate opinion contradicted the Utah Supreme Court in *Springville,*[34] and its own principle in *Hatch,*[35] In *Chicago, Burlington & Quincy. v. City of Chicago*, 166 U.S. 226, 241 (1897), this Court held that, " judgment of a State court, whereby private property is 'taken'... is, upon principle and authority, wanting in the due process of law." The Tenth Circuit in *Merritt,*[36] stated, "Where a court failed to observe safeguards, it amounts to denial of due process of law, court is deprived of jurisdiction."

In *Schroeder V. City of New York*, 371 U. S. 208 (1962), this Court, concluded, "THE posting of these signs, did not constitute personal notice...the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary requisites of ...right to be heard." In *Mullane,*[37] this Court, held "fundamental requirement of due process ...to be accorded finality is notice reasonably calculated, to apprise interested parties of the pendency of action and afford them opportunity to present objections." *Mullane,* at 320, instructs that courts examine the "reasonableness"[38] of Respondents' action. Petitioner was in **proximate** negotiations over

---

[34] *Springville Citizens v. Springville,*¶30 (1999 UT) 25 30, 979 P.2d. Municipal laws are enabled by statute, and presumed valid, UCA ¶10-9-1001(3)(a)

[35] *Hatch v. Boulder Town Council,* ¶ 9 ¶16, 21 P.3d 245,248 (UT App.2001) "Boulder Town Ordinance was enacted in violation of the enabling statute, and is invalid from its inception."

[36] *Merritt v. Hunter* ¶7, 170 F 2d 739, (10th Cir. 1948)

[37] *Mullane v. Central Hanover Bnk*, 339 U.S.306,314,315 (1950)

[38] Preserved: Reply Brief Chapter XIV, Page 31

lot 2, with the developer,[39] but, he relied on constructive notice, **after the changes**.[40]

The *Mullane Court,* 315, distinguished between due process, as mere gesture, and due process **that is due**. Requirements here, qualify as due process **that is due**, given, they are enabled by statute. Contrary to Respondents' claims, definitions of Lots show change: "Original CC&R 3.1: legal status of lots. "The Plat shows each Lot, its number. and dimensions from which size may be determined." Original CC&R ¶1.9: "Separate space in the property intended for independent use. [d]esignated as Lot on Plat" Restated CC&R (¶1.6), "common element shall mean utility lines, fences, landscaping, parking spaces, load, receiving areas and other portions of the property other than the buildings." Lot is now "building only."

The difference is quite dramatic. Petitioner had argued that, in the very least, the court ought to find the CC&Rs ambiguous.[41] LEBR shows its motive, by placing signs on Petitioner's building, claiming those portions were **"owned"** by the association.[42] LEBR, strategically, adjusted its position, as reflected in Utah Appellate opinion, Page 4(¶2), "Onyeabor still held the same title to her lots as described on the recorded plat,

---

[39] Preserved: "Writ" to Utah Sup Court chapter V(A) and II

[40] Following Appellate conclusion, Petitioner "would have" or "should have" seen the word "Restated" and realized her property is transferred to another. *Amoco Production Company v. USA* ¶14 (1980 10th Cir) 619 F.2d 1383, "constructive notice is a fiction."

[41] Preserved: Rehearing Brief Chapter III, Pages 8-10.

[42] Raile of LEBR (Appendix I ¶14, ¶17). "Parties need access over driveways **owned** by Association." See, Appendix N¶2-16

which was referenced in her deeds. The scope of the easements over common area was simply clarified." The above conclusion of law is ambiguous and a legal fiction at best. The Utah Appellate Court admits that Petitioner owns her property "fee simple" and "as described on the recorded plat," thereby, admitting the Plat Map as basis for its opinion. The Utah Appellate Court, then, erroneously concludes that Respondents simply, clarified "the common areas." However, the Plat is made up, **solely,** of privately-owned Lots; there are no common areas, "in there, somewhere," to clarify. "Clarification" is also called 'subdivision amendment' and would be subject to due process of law.

Next, the County's legal description held: "THE Plat illustrates lot 1 as including 23,384 sq ft. **There are no common** areas designated, illustrated or depicted on lot 1, **or within any portion of the plat.** This is typical...it is Planned Unit subdivision, not Planned Unit Condominium,'" Appendix K (2) ¶1-5. Common areas **must** show on the Plat by law, (SLCCO ¶20.24 .030 H), if approved. Next, Original CC&R ¶ 1.5(e):"Common areas are portions of the property, not located **within the Lot,"** To superimpose common areas on Lots is to extinguish Petitioner's 'fee simple.'

Next, the Plat Map constitutes express warranty,[43] endorsed by the County, to the buyer, against illegal transfers. Appellate opinion, Page 2: "CENTENNIAL Pointe LLC exercised its right under the Original CC&Rs to unilaterally amend **portions of the Original CC&Rs** that created an overlap in the description of the common areas and lots," In other

---

[43] Utah Code Ann. ¶ 70A-2-313)(b): Any description of the goods part of the basis of the bargain, model,... creates express warranty." *Preserved: Rehearing Brief page 7

words, one misinterpreted clause in the Original CC&R, supposedly, exempted Respondents from all due process of law. Next, Respondents changed property **ownership**, not merely **portions of the Original CC&R**. The *Harper* Court,[44] states, "[F]AILURE of a material condition precedent relieves the obligor of duty to perform." The Restated CC&R [45] contradicts the undisputed facts; the laws,[46] the County, and the Map. So, Respondents lack grounds to claim breach of contract.[47] To be subject to contract, Petitioner must **unequivocally** own property; her title has been clouded for ten years, by LEBR. An Association owns "common areas," in trust for the community (UCA.¶ 57-8-102(4). No such title or trust exists.

The United States Supreme Court must review the case, because, if this judgment is allowed to stand, it will be an illegally derived precedent, allowing developers to renege on contractual warranties on real estate, by simply revising the subdivision in the CC&R, after securing the sale. In *Sandy Valley,*[48] the Nevada Supreme Court, relying on the Plat Map, voided a rewritten CC&R, which conveyed property, already sold, back to the developer. See similar case in *Armstrong v. Homeowners* (NC S C 2006). 360 547 633 S.E.2d 78. Only the United States Supreme Court has the power to stem that tide. Once, the Utah Appellate

---

[44] *Harper v. Great Salt Lake.*C,(1999 UT)34,¶14, 976 P.2d 1213.

[45] Preserved: 'Writ" to Utah Supreme Court, Chapters II, VII

[46] Most incur criminal penalties, UCA¶10-9a-803(2), SLCCO¶20.36.020

[47] See, also, *Murphy v Crosland,* (UT 1996). 915 2d 491, 495.P*13. *And, Miller v. Celebration Min* (UT 2001).64; 29 p.3d 1231.

[48] *Sandy Valley v. Sky Ranch,* (Nev 2001) 117, 948; 35 P.3d 964

court affirmed Petitioner owns her Lots, 'fee simple,' actions that mitigate her rights, violate due process.

CONCLUSION:

In *Stop the Beach*,[49] Justice Kennedy concluded, at 4, (with Justice Sotomayor concurring), "The Court would be on strong footing in ruling decision that eliminates or substantially changes established property rights, "arbitrary or irrational" under the Due Process Clause." The United States Supreme Court in *Armstrong* v. Manzo 380 U. S. 545 (1965), held at 552, that denial of "the right to be heard" placed an unfair burden of proof on *Armstrong* to show that his child is really his. Similarly, Petitioner has had to show, for ten years, that her property is really hers. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 41 (1969), "this prejudgment garnishment procedure violates the fundamental principles of due process." Association I does not exist, and substitution was ineffective, and so, the judgment, here, qualifies as a "**prejudgment**."

The Utah Appellate opinion contradicted the United States Supreme Court in *Sniadach*, 395 U.S. 337, 41, in *Schroeder,* 371 U. S. 208, in *Scott* 154 U. S. 34, 50, and *Mullane.* The United States Supreme Court could review Question #4 in the light of any of these cases. The Court could review questions #1-2 in the light of *Arbaugh* 546 U.S. 500 or by interpreting Utah Code Ann. ¶ 42-2-10(1), and Section. ¶ 48-2a-1002 (now, 48-2c-1702) or by applying any other remedy the Court deems proper. The Utah Appellate Court lacked subject matter jurisdiction, denied

---

[49] *Stop the Beach Renourishment, Inc, v. Florida Department* of Environ. Protection Et al 998 So. 2d 1102, (560 US, 2010)

Petitioner's Fifth and Fourteenth Amendments Due Process protections and the judgment must be vacated.

Respectfully Submitted,

Myriam N. Onyeabor, Petitioner
P. O. Box 22244
Salt Lake City Utah 84122
801-556-0426

INDEX TO APPENDICES

Appendix A: Utah Appellate Court Opinion Was Dated December 13th 2009

Appendix B: Utah Appellate Court's Opinion denying Ms Petitioner's motion for Rehearing and Motion to supplement evidence was dated January 05, 2010.

Appendix C: Opinion of the Utah Supreme Court Denying Petitioner's Petition for A Writ of Certiorari Was Dated June 11th 2010

Appendix D: Salt Lake District Court Order for Substitution of Parties of September 15th 2005.

Appendix E: Salt Lake District Court's Order Granting Summary Judgment to Respondents Was Corrected and Dated January 28th 2008

Appendix F: Blank

Appendix G: Preservation of Issues

Appendix H: Constitutional & Statutory Provisions

Appendix I: Mr. Raile of LEBR's letter to Onyeabor dated June 11th 2002, acknowledging he participated in changing the CC&Rs.

Appendix J: Affidavit of Mr. Bezdijan

Appendix K: Salt Lake County Testimonies
K (1) Testimony by Mr. Wheelwright, Planning Commission Director

K (2) Testimony by the Salt Lake County.
K (3) the subdivision Permit

Appendix L (1): Petitioner's Motion to Dismiss

Appendix L (2): Ms Petitioner's Reply to Motion to substitute Parties.

Appendix L (3): Respondents Answer and motion to substitute parties

Appendix M: THE PLAT MAP-
M (1) Focus on Building one
M (2) Reduced Image showing Outline
M (3) Dedications (right of Plat)
M (4) Public easements (left of Plat)

Appendix N: Affidavit of Alexander Udeh.
Appendix O: Affidavit of Myriam Petitioner
Appendix P#1, P#2, P#3, P#4: Blockade of front doors, trailers, signs on Petitioner's buildings.

Appendix Q: Affidavit of James Walker

Appendix R: affidavit of Mr. Robert Mills

Appendix S: Affidavit of Mr. Travis Healey

APPENDIX A

IN THE UTAH COURT OF APPEALS

Centennial Pointe Owner's Association; LEBR Associates, LLC,	)	MEMORANDUM DECISION Not For Official Publication Case NO. 20070851
Plaintiffs, Appellees and Cross-Appellants.	)	FILED November 13, 2009 2009 UT App.325
v.	)	
Myriam Onyeabor	)	
Defendant, Appellant	)	
And cross-Appellee	)	

Third District, Salt Lake Department, 040918762.
The Honorable Robert P. Faust

Myriam Onyeabor, Salt Lake City, Appellant, and Cross-appellee, Pro se.
Jeffrey L. Silvestrini/ Edward T. Vasquez and George Hunt For Appellees and cross-Appellant

Before Judge Bench, Orme and Davis
ORME, Judge

The trial court properly determined that the "Restated Declarations, Conditions and Restrictions" (the Restated CC&Rs) were valid and encumbered both Lots 1 and 2. Which are owned by Myriam

Onyeabor.[118] The original " Declarations, Conditions and Restrictions" (Original CC&R) provided with our emphasis as follows:

> Except as provided below, the vote of Owners holding at least 67% of the Percentage Interests shall be required to amend this Declaration or the Plat. . The foregoing right of amendment shall, however, be subject to the following:
>
> (b) Until the Declarant[, Centennial Pointe LLC,] has sold all Lots, Declarant shall have the right unilaterally to amend and supplement this Declaration and the Plat to correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Project.

Centennial Pointe LLC exercised its right under the Original CC&Rs to unilaterally amend certain portions of the Original CC&Rs that created an overlap in the description of the common areas and lots, and recorded the Restated CC&Rs containing such amendments. We conclude that the trial court properly determined that Centennial Pointe was within its rights to unilaterally

---

[118] 1A recurrent theme in Petitioner's brief is that the trial court erred in making its various rulings, given her pro se status. While both trial and Appellate Courts tend to be more lenient with some procedural failures of a pro se litigant, pro se status does not excuse a failure to comply with evidentiary requirements before the trial court or a failure to provide meaningful legal analysis in an opening brief on appeal. See Lundahl v. Quinn, 2003 UT 11, ¶¶ 3-4, 67 P.3d 1000 (per curiam).We do not address unbriefed issues that are identified in

continued. . .)

amend the Original CC&Rs, based on the prescribed amendment procedure contained therein, when the amendments essentially clarified the scope of the common areas and the amendments were made prior to the sale of all the lots. Both the Original CC&Rs and the Restated CC&Rs defined common areas as including parking spaces.[119] As pointed out by Appellees, the Restated CC&Rs merely eliminated ambiguities created by the overlapping definitions of lots, buildings, and common areas in the Original CC&Rs, wherein lots were originally defined based on reference to the plat, which did not show common areas as being part of lots.

Furthermore, even though Onyeabor purchased lot 1 prior to the Restated CC&Rs becoming effective, lot 1 was clearly subject to the covenants, conditions, and restrictions set forth in the Original CC&Rs, including Centennial Pointe's right to unilaterally amend the Original CC&Rs to correct any technical errors or clarify any ambiguous provisions. Her special warranty deed stated her title was "SUBJECT TO current general taxes,

---

[119] Section 12.8 of the Original CC&Rs also indicated that "parking stalls are shown on the Plat as Common Area and the [Owners'] Association shall be responsible for the maintenance and repair thereof, and the cost of such management, operation, maintenance and repair by the [Owners'] Association shall be borne as provided herein." And section 4.7 provided:

> Each Owner shall have the right, which right shall be appurtenant to and pass with the title to such Lot, to ingress and egress over, upon and across the Common Areas as reasonably necessary for access to such Owner's Lot, and to park, and have its invitees and licensees park, in such parking stalls as exist on the Property from time to time[.]

These sections further evidence the intent of the Original CC&Rs that parking areas would be common areas for the use and benefit of all owners of lots within the complex.

easements, restrictions and rights of way of record." In light of the amendment procedure in the Original CC&Rs, which was correctly followed by Centennial Pointe, the Restated CC&Rs are applicable to lot 1. And given that Onyeabor purchased lot 2 after the Restated CC&Rs were recorded, lot 2 is also clearly subject to the Restated CC&Rs because that warranty deed,[120] although referencing the Original CC&Rs, also expressly provided that her title to lot 2 was subject to restrictions of record.

Contrary to Onyeabor's assertion, the amendments within the Restated CC&Rs did not constitute any sort of transfer in fee simple to the Owners' Association or to Centennial Pointe LLC. Onyeabor still held the same title to her lots as described on the recorded plat, which was referenced in her deeds. The scope of the easements over the common areas within the complex were simply clarified and corrected. As such, the trial court's determination that Onyeabor was required to pay the dues set forth in the Restated CC&Rs for maintenance of the common areas is affirmed. Its dismissal of Onyeabor's counterclaims for quiet title and declaratory judgment, which claims were based on the assertion that the Restated CC&R's were invalid is, therefore, likewise affirmed.

---

[120] Petitioner claims that because her deeds were warranty and special warranty deeds, they could not be subject to any encumbrances. However, Utah law clearly provides that such deeds may contain exceptions and that such exceptions may be stated following a deed's description of the land. See Utah Code Ann. §§ 57-1-12(3), -12.5(3) (Supp. 2009) Petitioner's deeds clearly had such exceptions that indicated her lots were subject to restrictions of record.

Continued...

Onyeabor's claim that she lacked notice of the Restated CC&Rs is without legal merit. Onyeabor had constructive notice based on her deeds' general references to restrictions of record. See Utah Code Ann. § 57-3-102(1) (2000); First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 837 (Utah 1998) ("Utah law recognizes [two] types of constructive notice. The first type is evidenced in the Utah Recording Statute, Utah Code Ann. § 57-3-[102](1), which provides that documents and instruments filed with the county recorder pursuant to this statute 'impart notice to all persons of their contents.'"). Further, the trial court found that her title report for lot 2 specifically referenced the Restated rather than the Original CC&Rs, which should have called her attention to the fact that two versions of the CC&Rs existed.

We also affirm the trial court's rulings on Onyeabor's claims of trespass and intentional infliction of emotional distress. The trial court correctly concluded that theundisputed facts did not show such egregious conduct as to support the intentional infliction of emotional distress claim, see generally Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 51, 194 P.3d 956 (outlining the requirements of intentional infliction of emotional distress), and did not show any trespass because the common areas could by accessed by all property owners within the development under the Restated CC&Rs, see generally Utah Code Ann. § 76-6-206(2) (2008) (stating the elements of criminal trespass).

Onyeabor's standing argument also lacks merit. Here, LEBR is an aggrieved owner and the Restated CC&Rs provided that an aggrieved owner, as well as

the Owners' Association, could bring suit to enforce payment of dues and other obligations under the Restated CC&Rs. And the stranger to the deed doctrine is inapplicable. See generally Potter v. Chadaz, 1999 UT App 95, ¶ 12, 977 P.2d 533 ("Utah law prohibits parties from expressly creating an easement in a land transaction for the benefit of a third party who is not involved in the transaction – i.e., a 'stranger to the deed.'"). That an association would be formed to manage the common areas on behalf of the owners of the lots within the complex was clearly anticipated in both the Original and Restated CC&Rs.

Onyeabor's fraud, constructive fraud, and fraudulent nondisclosure claims fail because she has not shown that the Owners' Association or LEBR had a duty to disclose the existence of the Restated CC&Rs or that either made any misrepresentation. See generally Giusti v. Sterling Wentworth Corp., 2009 UT 2, ¶ 53 n. 38, 201 P.3d 966 (listing elements of fraud); Hermansen v. Tasulis, 2002 UT 52, ¶ 24, 48 P.3d 235 (stating elements of fraudulent nondisclosure); Jensen v. IHC Hosps., Inc., 944 P.2d 327, 339 (Utah 1997) (outlining elements of constructive fraud). Onyeabor has also failed to convince us that the Restated CC&Rs were voidable, as to her, so that she could unilaterally decide to opt out of the Owners' Association. See generally Ockey v. Lehmer, 2008 UT 37, ¶ 19, 189 P.3d 51("Contracts that offend an individual, such as those arising from fraud, misrepresentation, or mistake, are voidable."

Regarding the cross-appeal, LEBR and the Owners' Association argue that the trial court did not consider all of the required attorney fee factors under

Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). See id. at 989-91. The trial court, however, clearly focused on what it considered to be the key factors, namely, the work performed and the scope of the work required. Thus, the challenge is really to the adequacy of the findings to disclose the steps the trial court took in making its ruling, which challenge was not preserved. See In re K.F., 2009 UT 4, ¶¶ 58-64, 201 P.3d 985 (reaffirming the holding of 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 56, 99 P.3d 801, requiring preservation of challenges to the adequacy of factual findings, and indicating that a challenge to a trial court's failure to disclose analytic steps is an adequacy challenge).

We also affirm the trial court's refusal to award the requested late fees and fines. The late fees and fine provision in the Restated CC&Rs is in the nature of a liquidated damages provision, which provisions will not be enforced if they impose arbitrary penalties, "bearing no reasonable relationship to the actual damages suffered" by the nonbreaching party. Woodhaven Apts. v. Washington, 942 P.2d 918, 920-21(Utah 1997). (Citation and internal quotation marks omitted). The trial court's award in the amount of dues, interest, and over $70,000 in attorney fees and costs adequately compensated Appellees for Onyeabor's breach in failing to pay. And we agree with the trial court's conclusion that the Owners' Association should not be "awarded any fines or penalties against [Onyeabor], since these penalties are not damages which have been sustained and suffered by the plaintiffs due to [Onyeabor]'s breach."

Affirmed. The parties will bear their own attorney fees and costs on appeal.

Gregory K. Orme, Judge
----/s/-
WE CONCUR:

Russell W. Bench, Judge

James Z. Davis, Judge

END OF APPENDIX A

APPENDIX B

IN THE UTAH COURT OF APPEALS

Centennial Pointe Owner's Association; LEBR Associates, LLC, Plaintiffs, Appellees and Cross-Appellants. v. Myriam Onyeabor Defendant, Appellant And cross-Appellee	Amended order Case NO. 20070851 FILED Jan 08 2010

This matter is before the court upon Appellant's motion to supplement documentary evidence filed December 14, 2009, and Appellant's petition for rehearing filed December 21, 2009.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing and the motion to supplement documentary evidence are denied.

Dated this 8th day of January 2010

___/s/_____
Gregory K Orme, Judge

END OF APPENDIX B

APPENDIX C

IN THE UTAH SUPREME COURT

Centennial Pointe Owner's Association; LEBR	)	
Associates, LLC,	)	FILED
Plaintiffs, Appellees	)	June 11 2010
	)	Case No. 20100183-SC
v.	)	
Myriam Onyeabor	)	
Defendant, Appellant	)	

ORDER

This matter is before the court upon a petition for Writ of certiorari filed March 5th 2010.

IT IS HEREBY ORDERED pursuant to Rule 51(a) of the Utah Rules of Appellate Procedure that the Writ of Certiorari is denied.

For the Court:

/s/
Mathew Durrant
Associate Chief Justice

END OF APPENDIX C

APPENDIX D

THE LAW OFFICE OF GREGG K. STEPAN, LLC
9075 South 1300 East, Suite 102B
Sandy, Utah 84094 Telephone: 801-572-6969 Facsimile: 801-572-6970
Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

ORDER **ON DEFENDANT'S** PROPERTY OWNERS MOTION **TO DISMISS AND PLAINTIFF'S MOTION TO AMEND AND SUBSTITUTE** PARTIES.

CENTENNIAL POINTE ASSOCIATION, [Registered Nov. 29th 2004], PLAINTIFF	)
v.	) *FILED
	) Sept 15 2005*
	) District Court
Myriam Onyeabor	) Civil No. 040918762
Defendant	) Judge Stephen L Roth.

On February 14, 2.005, at the hour of 10:00 a.m., this Court heard oral argument on Defendant's Motion to Dismiss, Plaintiffs Opposition to Defendant's Motion, and Plaintiffs motion to amend and substitute parties. Plaintiffs having appeared by

and through its counsel, Ray M. Beck and Edward T. Vasquez of COHNE, RAPPAPORT & SEGAL, P.C, and Defendant Myriam Onyeabor, having appeared by and through her counsel Gregg K. Stepan. The Court having reviewed the pleadings and supporting materials hereby enters the following:

IT IS HEREBY ORDERED that

1. Defendant's Motion to Dismiss is DENIED;

2. Plaintiffs Motion to Amend and Substitute Parties is GRANTED. Plaintiffs LEBR associates (LEBR) and Centennial Pointe Property owners' Association, Inc (registered on November 29th 2004 are substituted as plaintiffs in this matter.

3. The Court directs the parties to mediate this case after discovery has been completed.

Dated this 15th— day of September, 2005.

BY THE COURT

___/s/_____

The honorable Stephen Roth
Third Judicial court

APPROVED AS TO FORM:

/S/

GREGG k STEPHAN

*END OF APPENDIX D

APPENDIX E

Jeffrey Silverstrini (Bar no. 2959)
Edward Vasquez (Bar no. 8640
COHNE RAPPAPORT & SEGAL
257 EAST 200 SOUTH, Suite 700
SALT ALKE CITY UTAH 84111
TELEPHONE: (801)-532-2666
Attorney for Plaintiffs and third-party defendants Bruce Raile and Jennifer Clark

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

CENTENNIAL POINTE ASSOCIATION, Registered Nov. 29th 2004], nonprofit Corporation	) CORRECTED ORDER ON **PLAINTIFF'S summary**) **JUDGMENT AND**) **MOTIONS TO STRIKE**) **AND JUDGMENT**
v.	) *FILED Jan 28th 2008
Myriam Onyeabor	) Civil No. 040918762
Defendant	) Judge Robert Faust

Pursuant to Rule 60(a) of the Utah Rules of Civil Procedure, the Court hereby enters the following Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment ("Corrected Judgment"), which corrects a clerical error made in the original Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment ("Original Judgment"), dated October 1, 2007. The Corrected Judgment clarifies the Original Judgment regarding the Court's ruling

awarding attorney fees, specifically, that the attorney's fee award is part of the Judgment amount. This Corrected Judgment relates back to the Original Judgment executed and entered on October 1, 2007.

CORRECTED JUDGMENT

On May 2, 2007, at the hour of 10:00 a.m., the Court heard oral argument on the following motions: Plaintiffs' Motion for Partial Summary Judgment; Plaintiffs' Motion to Strike the Affidavit of Myriam Onyeabor; Plaintiffs' Motion to Strike the Affidavit of James Walker; Plaintiffs' Motion to Strike the Affidavits of Robert Mills and Travis Healey; Plaintiffs' Motion to Strike the Affidavit of Chinedum Alexander Udeh; Plaintiffs' Motion to Strike American Document Examiner's Expert Report and Exhibits 15 through 21 to Ms. Onyeabor's Opposition Memorandum; Plaintiffs' Motion to Strike Myriam Onyeabor's Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits. Ms. Onyeabor did not oppose Plaintiffs' Motion to Strike the Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits.

The aforementioned Motions were fully briefed and properly submitted to the Court for decision. Plaintiffs were represented by and through their counsel, Jeffrey L. Silvestrini and Edward T. Vasquez of Cohne Rappaport & Segal, P.C., Donald Ijjanborn was represented by Mark R. Anderson of Williams & Hunt, and Myriam Onyeabor appeared pro *se*.

1. The Court, having reviewed Plaintiffs' Motions to Strike, the affidavits relevant thereto, the exhibits relevant thereto, and the pleadings in this matter, hereby issues the following ruling on those Motions: For the reasons set forth in Plaintiffs' Motion to Strike the Affidavit of Myriam Onyeabor; Plaintiffs' Motion to Strike the Affidavit of James Walker; Plaintiffs' Motion to Strike the Affidavits of Robert Mills and Travis Healey; Plaintiffs' Motion to Strike the Affidavit of Chinedum Alexander Udeh; Plaintiffs' Motion to Strike American Document Examiner's Expert Report and Exhibits 15 through 21 to Ms. Onyeabor's Opposition Memorandum; Plaintiffs' Motion to Strike Myriam Onyeabor's Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits, and good cause therefor, Plaintiffs' Motions are GRANTED and the aforementioned affidavits, exhibits, and pleadings are STRICKEN in their entirety.

2. The Court, having reviewed Plaintiffs' Motion for Partial Summary Judgment, the affidavits, deposition testimony and other exhibits appended thereto, Ms. Onyeabor's Opposition to Plaintiffs' Motion, Plaintiffs' Reply Memorandum in support of their Motion, the pleadings in this matter and good cause therefor, hereby RULES as follows:

a. The undisputed facts and evidence in this matter show, as a matter of law, that the Restated Covenants, Conditions and Restrictions of Centennial Pointe recorded in August 2002 (the "Restated Amended CC&Rs") are valid and encumber the entire

Centennial Point development, including Lots 1 and 2 owned by Defendant Myriam Onyeabor. The undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor hadactual notice of the Restated Amended CC&Rs by virtue of the fact that Ms. Onyeabor received title work, followed by a policy of title insurance for Lot 2, that expressly disclosed that Lot 2 was encumbered by the Restated Amended CC&Rs. The undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor had record notice of the Restated Amended CC&Rs and that the Special Warranty Deed from Centennial Pointe, LLC to Ms. Onyeabor for Lot 2 expressly states that Centennial Pointe, LLC's conveyance to Ms. Onyeabor was subject to any restrictions of record. Finally, the undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor, through her conduct and her participation in the Centennial Pointe Owners Association (the "Association"), has ratified the Restated Amended CC&Rs.

b. The undisputed facts and evidence in this matter show, as a matter of law, that Centennial Pointe's developer, Centennial Pointe, LLC, had the authority, pursuant to Centennial Pointe's April 2000 CC&Rs, to amend Centennial Pointe's CC&Rs. The undisputed facts and evidence in this matter show, as a matter of law, that the Restated Amended CC&Rs were validly adopted according to the procedures set forth in the April 2000 CC&Rs, and that the Restated Amended CC&Rs are consistent with the general plan and scheme of Centennial Pointe reflected in the April 2000 CC&Rs, particularly in respect to Ms. Onyeabor's objections thereto. Both the April 2000 CC&Rs and the Restated Amended CC&Rs define Centennial Pointe's common area to include the same property, i.e., parking areas,

sidewalk areas, landscaped areas, and loading dock areas. Both sets of CC&Rs provided for an owners association empowered to levy assessments for maintenance of Centennial Pointe's common areas and to lien property for unpaid assessments. Both sets of CC&Rs provided for a reciprocal easement for use of Centennial Pointe's common areas by all owners, tenants and invitees. The undisputed facts and evidence in this matter show, as a matter of law, that the purpose of Centennial Pointe, LLC's adoption of the Restated Amended CC&Rs was to clarify and refine certain definitions contained in the April 2000 CC&R's which were unclear, but that the adoption of the Restated Amended CC&Rs did not change the configuration of the Centennial Pointe development respecting the location of buildings on the property, or the nature or extent of common areas.

c. The undisputed facts in this matter show that Ms. Onyeabor has failed and refused to pay her pro rata share of Centennial Pointe's common expenses. The undisputed facts in this matter show that Ms. Onyeabor ceased paying her Centennial Pointe assessments in October 2002.

d. The undisputed facts and evidence in this matter show, as a matter of law, that the Association is entitled to its attorney fees incurred in prosecuting this action and defending against Ms. Onyeabor's counterclaims and third-party claims.

e. Based upon the affidavits of Plaintiffs, the Association is entitled to judgment in the amount of $18,749.87 for past due and owing assessments and $5,081.14 accrued as interest, calculated at the rate of 18% per annum.

f. Further, as set forth in the Supplemental Affidavit of Edward T. Vasquez filed with the Court on June 20, 2007, the Association has incurred attorney fees in enforcing Centennial Pointe's CC&Rs and defending against Ms. Onyeabor counterclaims and third-party claims, which necessarily involved defending Centennial Pointe's Restated Amended CC&Rs, in the amount of $136,589.00. The costs in this matter total $6,914.09; combined these figures total $143,503.09. The Association is awarded its reasonable attorney fees in the amount of $68,294.50, and its costs in the amount of $3,088.19, for a combined total of attorney fees and Costs in the amount of $71,382.69.

g. The undisputed facts and evidence in this matter and the reasons set forth in Plaintiffs' Motion for Partial SummaryJudgment, show that Onyeabor's claim for Intentional infliction of emotional distress fails as a matter of law. The conduct that Ms. Onyeabor has asserted is not sufficiently revulsive or outrageous to sustain her claim.

h. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor has failed to satisfy the nine elements required to show fraud, *see Armed Forces Insur. Exch. v. Harrison,* 2003 UT 14,^j 16, 70 P.3d 35, including, but not limited to, any false representation by either LEBR or the Association. Ms. Onyeabor's fraud claims against the Association and LEBR fail as a matter of law.

i. The undisputed facts and evidence in this matter, and the reasons set forthin Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim against Bruce Raile for trespass fails as a matter of law because, *inter alia,* the alleged conduct occurred

on Centennial Pointe's common areas, to which all Centennial Pointe owners and invitees have a reciprocal access easement.

j. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim against Bruce Raile for assault fails as a matter of law because, *inter alia*, Mr. Raile has never touched Myriam Onyeabor, threatened her, or called her names and that his statement to her were a privileged attempt to enforce the rights of the Association and its members to use common areas of Centennial Pointe to which they held a reciprocal easement.

k. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claims against LEBR for trespass and assault fail as a matter of law because, *inter alia*, Jennifer Clark is not and has never been an employee of LEBR.

L. Plaintiffs' Motion for Partial Summary Judgment did not reach Ms. Onyeabor's claims for nuisance and breach of the CC&Rs against the Association and LEBR, or Ms. Onyeabor's assault claim against Jennifer Clark.

m. The Court concludes as a matter of law that the Association's affirmative claims against Myriam Onyeabor to enforce the April 2000 CC&Rs and the Restated Amended CC&Rs and Myriam Onyeabor's counterclaims' against the Association, excepting Ms. Onyeabor's claims for nuisance and breach of the CC&Rs, and her third-party claims against Bruce Raile, an officer of the Association, share a common

factual basis, are closely related and inextricably intertwined.

n. The Court finds and concludes as a matter of law that Plaintiffs' efforts in developing facts and evidence to establish the validity of the Restated Amended CC&Rs and Ms. Onyeabor's contractual obligation to pay her past due assessments also led to, and were inextricably intertwined with, facts and evidence to defeat Ms. Onyeabor's counterclaims against LEBR for fraud, trespass, and assault.

o. The Court concludes as a matter of law that the Association is entitled to its attorney fees in pursuing its affirmative claims against Myriam Onyeabor to enforce the April 2000 CC&Rs and the Restated Amended CC&Rs and for defending against Myriam Onyeabor's counterclaims against the Association and LEBR, and third-party claims against Bruce Raile, the Association's president. *See Brown v. David K. Richards & Co.*, 1999 UT App 109, ffi| 19-24, 978P.2d470.

p. The Court concludes as a matter of law that the disposition of Plaintiffs' Motion for Partial Summary Judgment in favor of Plaintiffs completely resolves Plaintiffs' claims against Ms. Onyeabor, and that no further judicial action remains to be taken respecting Plaintiffs' claims.

q. The Court concludes as a matter of law that the disposition of Plaintiffs' Motion for Partial Summary Judgment in favor of Plaintiffs wholly disposes of Ms. Onyeabor's counterclaim and third-party claim for intentional infliction of emotional distress, Ms. Onyeabor's counterclaims for fraud against the Association and LEBR, Ms. Onyeabor's counterclaims for trespass and assault against LEBR, and Ms.

Onyeabor's third-party claims for trespass and assault against Bruce Raile. No further judicial action remains to be taken respecting these claims.

r. The Court concludes as a matter of law that there is no just reason for delay of entry of a final judgment in this matter on the Association's claims for damages and attorney fees. The claims asserted by Myriam Onyeabor for nuisance, breach of the CC&Rs, and assault are compensable in damages, however, the claims are so dissimilar from the claims for payment of common area expenses for utilities and maintenance which Myriam Onyeabor and the occupants of her properties have enjoyed, without paying for them, that the Court believes that entry of a final judgment in favor of the Association for the common area expenses, interest and attorney fees incurred in prosecuting this action and defending against the claims of Ms. Onyeabor dismissed to date, are sufficiently separate and distinct as to warrant the entry of a final judgment and certification of that judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

s. The Court concludes as a matter of law that the disposition of Plaintiffs' Motion for Partial Summary Judgmentin favor of Plaintiffs wholly disposes of Ms. Onyeabor's claims for quiet title and for declaratory judgment. Because the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's Lots 1 and 2, those claims are DISMISSED with prejudice.

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Partial Summary Judgment is GRANTED;

2. Judgment is hereby entered in favor of the Association and against Myriam Onyeabor for past due assessments in amount of $18,749.87 plus interest at the rate of 18% to date in the amount of $5,081.14

3. Plaintiffs' request for fines and late fees, as provided for in the April 2000 CC&Rs and Restated Amended CC&Rs, is DENIED;

4. The Association is awarded its attorney fees and costs, as provided for in the April 2000 CC&Rs and in the Restated Amended CC&Rs, for (a) enforcing the CC&Rs; (b) collecting common area assessments and interest owing for Lots 1 and 2, and (c) defending claims against The Association or us oincers oaseu upon meir ngni to eniorce me Kestatea Amended Uu and their right to use the common areas of Centennial Pointe or asserting their right to do so (e.g.the trespass, assault, and emotional distress claims). The Association is awarded its reasonable attorney fees in the amount of $68,294.50, and is awarded its costs in the amount of $3,088.19.

5. Judgment is entered against Myriam Onyeabor in favor of the Association in the total amount of $95,213.70, + interest at the judgment rate of 6.99% from and after date of entry

6. The Sheriff of Salt Lake County is hereby directed to sell Lot 1 and Lot 2 owned by Myriam Onyeabor, for the purpose of satisfying the Judgment, unless Myriam Onyeabor satisfies the same before such sale may be noticed and conducted under law;

7. Myriam Onyeabor's counterclaim for intentional infliction of emotional distress are DISMISSED with prejudice;

8. Myriam Onyeabor's claim for fraud against LEBR and the Association is DISMISSED with prejudice;

9. Myriam Onyeabor's claims for trespass and assault against Bruce Raile are DISMISSED with prejudice;

10. Myriam Onyeabor's claims for trespass and assault against LEBR are DISMISSED with prejudice;

11. In light of the Court's ruling GRANTING Plaintiffs' Motion for Partial Summary Judgment, Myriam Onyeabor's Counterclaims for Quiet Title and Declaratory Judgment alleging that lots 1 and 2 are not burdened by the April 2000 CC&R and the Restated CC&R are DISMISSED with prejudice; and

12. In light of the Court's ruling GRANTING Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike, Myriam Onyeabor's Countermotion for Summary Judgment fails as a matter of law and is DENIED;

13. This Order and Judgment is hereby certified as a Final Order pursuant to the provisions of Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this *28th of* January2008

Approved as to form:

_____

Mathew Hilton

Attorney for defendant

_____

George hunt

William & Hunt

Attorneys for Donald Sanborn

BY THE COURT:

_/s/_____

the Honorable Robert Faust

The Judicial district court

*** END OF APPENDIX E***

APPENDIX F (1)

BLANK

APPENDIX G

ISSUE PRESERVATION

ISSUE I: RESPONDENTS' LACK OF STANDING ON PAGE

ISSUE I, Questions 1 and 2, were, generally, preserved: in Onyeabor's Motion to dismiss (Appendix L (1) & L (2)) and Respondents' countermotion to substitute parties (Appendix L (3)) is also attached.
Preserved also, Opening Brief Chapter Page 50-51

SPECIFIC REFERENCES ARE PRESERVED AS FOLLOWS:
1) Association II and LEBR lack standing because they are corporate entities that do not qualify for substitution under Utah laws.
Preserved: See Appendix L (2). Chapters II and III
Preserved: See also Onyeabor's Writ of Certiorari to UT Supreme Ct page 18-19. Reply Brief Pages 1- 4

2) The provision more specific in application governs over the more general provision
Preserved: See Onyeabor's "Writ" to Utah Supreme Court Page 15-16. Chapter V (E)

3) Conditions precedents (Laws Ordinances, requirements of CC&R.) were not met which precludes the grant of attorney's fees...
Preserved: Opening Brief Chapters VI and VII Pages 39-43

4), Association I was non existent and had no rights to pass on to Respondents. Order was not retroactive
Preserved: See Opening Brief, Page 34-39 Chapter V. see also Appendix L(2) Chapters II and III, .
Onyeabor's "Writ" to Utah Supreme Court, Page 4.
See Court Orders at Appendix A & D

5) Liens are only Subject to Judicial Foreclosure:
Preserved: Opening Brief, Pages 42-45. Chapter VII.

6) Utah Code Ann. ¶ 48-2a-1002 (now 48-2c-1702), 2009- Association II, which did not exist when issues in dispute arose may not substitute and create standing. Preserved: See also Onyeabor's Writ of Certiorari to UT Supreme Ct page 18-19. Reply Brief Chapter VI(A)

7) Jurisdiction is an issue of law, not of discretion or equity
Preserved: at Appendix L (2) chapter II and III

8) Part performance of the 2002 agreements removed them from statute of fraud
Preserved: Opening Brief Chapter VIII pages 46-48
Preserved: "Writ" to Utah Supreme court pages 8-9 2(C)

9) Pursuant to Utah Rule 23A (b), LEBR can only represent the group against Assoc..
Preserved: "Writ" Page 18-19 Chapter VI(A)

10)The Court misinterpreted and misapplied the "*disclaimer*"
Preserved : See Onyeabor's "Writ" to Utah Supreme Court Page 15-16. Chapter V(E). Preserved Reply Brief Chapter V (i and ii) pages 9-10.

****

Hereafter made provision
Lot 1 was not subject to the Restated CC&R.
Respondents and Onyeabor agreed
Preserved: See Onyeabor's "Writ" to Utah Supreme Court, Page 7. Onyeabor's Opening Brief page 20 (D) ¶26-¶28. Reply Brief Page 4-5 Chapter II

11) LEBR made up for its deficiency by blockading Onyeabor's property. Preserved: Robert Mills at Appendix R ¶12-16.
Preserved: See Onyeabor Appendix O ¶3-26. (R 1478)
Preserved: See Appendix P#1 P#2 P#3 P#4
Preserved: Onyeabor's Petition for Writ to Utah Supreme Court, Page 17, Chapter H

12) Rule 15 Civ.P. Does Not Allow Creation of Original Jurisdiction where none existed.
Section 16-6a-611- neither the bylaws nor CC&R would vest right in either Association, unless expressly granted
Appendix L(2) chapters II and III
Preserved: Rehearing chapter I(2) Page 1-2

13) LEBR is fully responsible for dissolved Association I's bills after dissolution in September 27th 2001, not Onyeabor.
Preserved: Opening Brief pages 44-45 chapters VII. Page 42-45. ; Chapter VII. Onyeabor's "Writ" to Utah Supreme Court, Pg 18-19; Reply Brief Pg 1-2

14) Onyeabor extensively argued that there is ambiguity in both CC&Rs
Preserved: Rehearing Brief Chapters III and IV, Pages 8-12. Onyeabor' Opening Brief Chapter IX (A-

D) Pages 52-55 and Chapter X, page 56, Opening Brief Chapter VI

15) Appellate actions constitute a taking, Amendments and rezoning without permit, via court order, and a breach of separation of powers between the legislative and the judiciary.
Preserved: See "Writ" to Utah Supreme Court, Chapter I, Pages 4-8 and Chapter V (H) page 18.

16) Levanger v Vincent : Corporate laws demand **open meetings**, not Constructive Notice as acceptable method to inform owners of change. Violation of corporate Acts
Preserved: Rehearing Brief: Chapter II (1&2), pages 5-6. Preserved: Reply Brief page Chapter VI,(2) pages 10-12
Preserved: "Writ" to Utah Supreme Court Chapter V (A) Pages12-13

17) Agreements of 2002—
Part performed. Between 2002-onset of litigation, Opening Brief. Pg 45-50 (Chapter VIII)

18) Onyeabor quiet title claims.
Preserved: Reply Brief. Page 24-25 and Page 31; Onyeabor's "Writ" to the Utah Supreme Court Page 7
Onyeabor had argued Denial her quiet title is a denial of due process: at Opening Brief chapter III (A), Pages 24-25

19) Violation of Ordinances and Codes:
Preserved: Onyeabor's "Writ" to Utah Supreme Court Chapter II pages 9-10. Reply Brief Page 9-11.

20) Violation of Corporate laws:

Preserved: see Appendix L (1) and L (2); Reply Brief pages 1-2.

21) Associations cannot claim easements that "run with the land"-touch and concern the land reserved: "Writ" to Sup Ct chapter V (H) page 17- 18

23) Appellate actions constitute a taking, Amendments and rezoning without permit, via court order, and a breach of separation of powers between the legislative and the judiciary.
Preserved: See "Writ" to Utah Supreme Court, Chapter I, Pages 4-8 and Chapter V (H) page 18.

24) Police documented harassment of Onyeabor's
Reserved: See Onyeabor's Reply Brief Page24- 26.

25) There was no contract because contract requires mutual assent and "meetings of the mind."
Preserved: Writ" to Utah Supreme Court, Chapter V, Pages 13-14

APPENDIX H

CONSITUTIONAL- STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

END OF APPENDIX H

APPENDIX I

Memorandum

To: Bruce and Laura Raile
From: Dave Castleton---attorney to LEBR
Date: ***June 11 2002***
Subject: Centennial Pointe property owners' association.

Forwarded to Myriam Onyeabor

Miriam, I hope this helps explain our situation please check with your own attorney to verify-

Thanks you for sending me a copy of Myriam Onyeabor's letter concerning centennial Pointe property owners association (the association"). **It appears that she has not been advised concerning the nature of the ownership interest she has** and the effect of the recorded documents establishing various covenants' conditions and restrictions with respect to her property. The purpose of this memo is to explain how the association works and how it relates to the interest of the owners in their respective parcels' what is would take to change the current structure' and to offer suggestions about future management and operations.

¶12 The Property is currently platted as a planned development because the Lots cannot stand on their own. In order to be separate and distinct parcels the lots would have to be redrawn so that each building is on a separate parcel. This may be close to impossible because the buildings could not meet set back and other requirements imposed bylaw.

¶13 **Separation of the lots would also require a new plat be made and all necessary plat approvals obtained.** Such a process would be expensive and time consuming. As stated above, it is unlikely that the property could be split in a way that would be approved. I am sure that is the reason it was designed as a planned development in the first place.

¶14 **If all the parties having an interest in the Property agreed**, you could change the terms of the Declaration. **However' because all parties need access over certain driveways owned by the Association,** you would still need common **areas** of cross easement agreements to insure access. **The parking stalls are currently controlled by the Association.** This allows flexibility in meeting the needs of all owners.

¶16 You may experience great difficulty among the lenders to change the terms of the Declaration at this stage. It may be difficult to come up with an arrangement that would give you the flexibility you want and still protecting their security

¶17 **We spent a considerable amount of time back at the time you purchased your Lots to make the declaration a workable document.** It is designed to make provide a method of maintenance and operation of the entire Property that is in the best interest of all owners. **It is true that you give up some of the flexibility that you would have it you were the owner your own separate parcel'** however' each of the parties knew when they acquired their lots that they were simply a piece of a planned development.

Please let me know if you have any further questions concerning the association. I believe it can work to the benefit of all the owners if the terms of the declaration are followed.

APPENDIX J

Affidavit of Paul Bezdijan (Record at 2124)

MYRIAM N ONYEABOR (Pro se)
P.O 521297
Salt Lake City UT. 84152
801-259-1195
FAX 801-487-9005

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY STATE OF UTAH

LEBR ASSOCIATE & Centennial Pointe Owners Association Vs Myriam Onyeabor Defendant V. Bruce Raile and Jennifer Clark Donald Sanborn.	**Affidavit of Paul Bezdijan** Civil case No. 040918762 Judge Faust

STATE OF UTAH
PAUL BEZDIJAN, being duly sworn and upon oath and states the following:
1) I am over the age of 18, capable and competent to testify in a court of law.
2) That I have personal knowledge of the incidents involved in this case and can testify-to them.
3) That I am the owner and CEO of Northwest Machine, a Utah corporation.

4) That I was a property owner at Centennial Point Subdivision from Sept 2000-Nov 26th of 2003 when I sold my property. I did own lots 4, 5, 6, 7.
5) That Ms Onyeabor did complain to me on numerous occasions, starting early 2001, about Mr. Raile's employees parking and blocking the entryways into her buildings while I was there. And *I* had been a witness at a couple of meetings when Ms Onyeabor was upset and confronted Mr. Raile about how Mr. Raile's numerous employees were blockading the entrances into Ms Onyeabor's business and refusing to move their vehicles when asked to.
6) That on around February of 2002, we held an emergency meeting of all the property owners of Centennial Point Industrial park in order to resolve ambiguities in the CC&Rs. That the president of the Association, Mr. Raile, at my request, called this meeting. That we held this meeting in order to debate and change the CC&RS of Centennial Point Industrial.
7) That the aim was to give full and uninhibited control and powers over each "Lot" as it appears on the Plat map to the owner of the "Lot," so that each property owner was independent enough to make the best use of their property as he/she sees fit.
8) The other objective was to establish that the owner had exclusive power and control over the "Lots" and not the Centennial Point Association.
9) The next goal was to leave the management and maintenance of each "lot" completely in the hands of the owner of each lot, as the "lot" is depicted on the Plat map, in order to cut costs and make the maintenance affordable for each owner, and promote independent use of property by individual owners.
10) Every owner was present at the meeting. The material facts as to what the meeting was about was clear to every owner and it was a meeting to debate and change the

CC&RS. We debated the issues for a while before putting the covenants to a vote. Ms Onyeabor and I, (Mr. Paul Bezdijan), had voted to pass the covenants we suggested (listed below), we had the 67% required by the bylaws, and so the covenants passed.

11) Ms Onyeabor was present. Mr. Raile of Sun optics was present. I, Paul Bezdijan, was present. Mrs. Laura Raile was present and served as secretary.

12) Ms Onyeabor owned 2 lots and so held 25% voting rights. 1 owned 4 Lots **and so held** 50% voting rights. Mr. Raile had a single double-Lot and so held 25% of the voting rights. 67% was required to change the CC&RS. Mr. Raile was against the amendments, so Ms Onyeabor and I voted in the amendments because we collectively had 75% voting rights, so the declarations and easements we suggested were passed.

13) Here listed below are all details of the covenants we passed that day:

a) Exclusive control of lots, as depicted on the Plat Map, by each owners and
owners only

b) Exclusive maintenance of lots, as depicted on the Plat Map, by individual
owners only

c) Complete separation of water and security lights from one another and meters be installed for each owner.

d) Free and independent use of property by each owner of such lots.

e) Every owner should exit from the access way on his property.

f) That all owners separate and be as independent from one another as much
as possible in order to minimize conflicts.

g) Ms Onyeabor and Mr. Raile should investigate about separating their common Utility room

h) Centennial Point Association had no further rights to do anything on any owner's lots without owner's permission

i) Individual owners had no right to do anything on any other owner's lots without the permission of the Lot owner.

14) Mr. Raile never gave me a reason as to why the covenants were never recorded at the county but I had assumed that he was not happy about the fact his position did not win. The important thing was that all property owners abided by the covenants and understood what the material facts and implications of the meeting and the voting process were, and this is based on the fact that no owners had expressed to me that they did not understand we had chnaged the CC&Rs. We lived with the easements we passed that day as oral agreement and simply abided by them.

15) It was clear that everybody was abiding by the covenants and there was never any complaint by either Ms Onyeabor or Mr. Raile about any errors in the meeting or in the voting process. I did not observe any errors myself. Mr. Raile dissented and that was his right. Ms Onyeabor and I voted to pass the covenants and that was our right too.

16) I was not an official of Centennial Point Association and so could not do the recording of easements at the county. As I recall, Ms Onyeabor was not an official of Centennial Point Association and so could not record the easements.

17) Soon after the covenants were passed, I was able to separate my meters and wateriines from the other owners, as agreed, since my building was in the rear and separate from Lots 1. 2 and 3. That Ms Onyeabor and Mr Raile shared a common wall, had commom wateriines and security light, and so were having a tougher time separating theirs. I do recall that Ms Onyeabor and Mr. Raile were still receiving a common bill for those two items only, after the separation. 1 do recall that Ms Onyeabor used parts of my

lots a few times and she got my permission each time. All owners abided by the covenants we passed that day.

18) The owners were now so independent from one another after the CC&R vote in 2002 that I took it a step further and wanted to completely exist independent of the subdivision since I had no common walls with Mr. Raile and Ms Onyeabor. I was in the process of investigating, at the County, about the possibility of separating my property completely from the subdivision, and being an independent property, when I had to sell my property and leave Centennial Point. So I never got to accomplish the total separation.

19) I did my own maintenance starting from the date the covenants were voted in early 2002. Myriam Onyeabor did her own maintenance and Mr. Raile did his maintenance.

20) Centennial Point Association was no longer authorized, after the vote, to exercise control on areas designated as "Lots" on the Plat. Centennial Point Association did not have any further authority on "Lots," or the power to maintain the "Lots." It was clearly rectified that "Lot," belonged to the owner, absolutely:- to manage, maintain and control.

21) That I did my maintenance up until the time I sold my property and left Centennial Point, November 26th of 2003 (after selling lots 4,5 6) or December 23rd 2003 (after selling Lot 7 to Snowcap realties).

22) I do recall vividly that Myriam Onyeabor and Mr. Raile were each still doing their separate maintenances at that time I was leaving.

Dated this_____12th_____day of June 2007

____/s/_____Paul bezdijan

Subscribed and Sworn before me this__12th____day of June 2007.

State of Utah

County of __Salt Lake
On this_12__day of June in the year 2007
Before me Jon Boyle
Personally Appeared___/s/__Paul bezdijan
Proved on the basis of ---evidence
To be the person(s) whose name(s) is/are subscribed
To this instrument and acknowledged he/she/they w executed
the same. Witness my hand and official seal.
__/s/__- Jonathan boyle

Notary Public. Jonathan Boyle. U of U Medical Center, Bldg 521, Salt Lake City Utah 84112. My commission expires June 7th 2009- STATE OF UTAH.

*END OF APPENDIX J *

APPENDIX K

AFFIDAVIT

I, Deborah Martin, Secretary for the Board of Adjustment on Zoning for Salt Lake City, Utah, do hereby certify that the attached documents (5) are full, true and correct copies of Planning Division File 410-319 (Petition 400-98-53) as they appear in the record of the City & County Building, 451 South State Street, Salt Lake City Utah.

_/s/_____ Deborah Martin, Secretary

STATE OF UTAH)ss

City and County of Salt Lake)

The foregoing instrument was acknowledged before me, 3rd day of December 2009, by Deborah martin, secretary for the board of adjustment

Scott Crandall
Notary public STATE OF UTAH
451 South state Street RM 415
Salt Lake City Utah 84111

___/s/_____

Notary public residing in salt Lake County, Utah

Continued ...

Appendix K (1)

SALT LAKE CITY CORPORATION

Department of Community Development
Planning and Zoning division

Alexander C Ikefuna
Planning Director
Douglas wheelwright AICP
Deputy planning director
director
Cheri Coffey AICP
Deputy Planning director

Ross C anderson
Mayor
Louis Zunguze
Community Dev.

Myriam Onyeabor And
To Whom It May Concern

Re: Amended Portion of Lot 5, Phase V, Centennial Industrial Park, a Planned Development Subdivision, Salt Lake County Recorder's Office entry # 7341882 at Book #99-5P, Page 117.

On November 15, 2005, Ms. Myriam Onyeabor came into the office of the City Planning Division, Salt Lake City Corporation, 451 South State Street, Salt Lake City, Utah 84111, and reviewed the office subdivision file (#S98-43) concerning a subdivision amendment application that was processed, and produced the above referenced subdivision amendment plat. Ms. Onyearbor was granted access to review the file and was given an opportunity to mark various pages within that file for subsequent copying by City employed secretaries at her cost. This subdivision file is the permanent record of the subdivision amendment process, which produced the above referenced plat, which was recorded with the County Recorder on May 3, 1999.

The above referenced subdivision amendment plat is the official subdivision plat of record, since no other subsequent amendment applications have been presented to the City for processing according to our City Code Title 20 -Subdivision Ordinance. There has never been an application for condominium conversion presented to the City for this property and there is no public record of any condominium approval ever having been granted or considered by the City. If anyone has additional question on this matter, I am the best contact point for the City on this issue.

Sincerely:

_____/s/_____

Douglas L. Wheelwright, AICP
Deputy Planning
Director

Cc: Alex Ikefuna

121

451 SOUTH STATE STREET. RODM 4O6, SALT LAKE CITY, UTAH 84 11 1
PHONE: B01-535-7902 FAX: SO 1-5 3 5-6 1 74 TD D: B D 1-5 3 5-6O21 www.SLCGOV.COM

Continued ...

APPENDIX K (2)

SALT LAKE CITY CORPORATION
Department of Community

And economic development
Planning division

Wilford H. Sommerkorn Ralph Becker, Mayor
Planning Director Frank b. Bray, Director
PATRICIA CDMAREL
Community & econ. Dev.

Assistant Planning Dir.
December 10, 2009

Ms. Myriam Onyeabor
1755 South 4490 West, Suite A
Salt Lake City, UT

RE: ADMINISTRATIVE INTERPRETATION FOR PROPERTY LOCATED AT 1755 S. 4490 W., SALT LAKE CITY, UTAH (PLNBOA2009-01374)

Dear Ms. Onyeabor;

This letter is in response to the above-referenced application and property. The following information is based on a copy of the recorded plat for "Amended Portion of Lot 5 Phase V, Centennial Industrial Park" (the Plat), a copy Planning Commission staff report to approval of this subdivision, and on the ordinances of Salt Lake City, Utah. The Plat refers to recorded documents under the heading "Notice to Purchasers." These documents were not readily available and were not considered in this review of the Plat.

It is understood that the Plat is the subject of litigation between private parties (Utah Court of Appeals, Case No. 20070851 - CA). This information is intended simply to answer specific question posed to the Planning Division of Salt Lake City by Myriam Onyeabor.

1. The copy of the Plat illustrates Lot 1 as including 23,384 square feet. The Lot is generally illustrated as being 124 feet wide by 190 feet deep. This is the subdivision Lot 1 for the Plat. The copy of the Plat includes an area within double lines designated as "Lease space #1" of 5,850 square feet within Lot 1. This appears to be a potential building footprint, not a subdivision lot.

2. There is no common area designated, illustrated or depicted within Lot 1, or within any portion of the Plat. This is typical considering the Plat is referred to as "a Planned Development Subdivision" instead of a Planned Development Condominium.

3. There is one, 15-foot Public Utility Easement that runs along the pubic road frontages of 4490 West Street and 1730 South Street. This PUE is within Lot 1. There are no other easements, of any kind, illustrated on the Plat within Lot 1. Other easements may be referred to in the documents referred to in the Plat notes, but other potential easements are not illustrated on the Plat.

4. The copy of the Plat illustrates Lot 2 as including 15,554 square feet. Lot 2 is generally illustrated as being 81.83 feet wide by 190 feet deep. This is the subdivision Lot 2 of the Plat. The copy of the Plat includes an area within double lines designated as "Lease space #2 of 5,850 square feet within Lot 2. This appears to be a potential building footprint, not a subdivision lot.

5. There is no common area designated, illustrated or depicted within Lot 2, or within any portion of the Plat. This is typical considering the Plat is referred to as "a Planned Development Subdivision" instead of a Planned Development Condominium. [122]
6. There is a 15-foot Public Utility Easement along the frontage of 4490 West Street that is included within Lot 2. There are no other easements of any kind illustrated within Lot 2.

7. Both Utah State law and Salt Lake City Ordinance require a public hearing for amending a subdivision plat (Utah Code 10-9a-608 and Salt Lake City Subdivision Ordinance Section 20.31.080).

8. The above-referenced subdivision was approved as a Conditional Use for a Planned Development. According to Salt Lake City Ordinance, a new application is required for "Modification and Amendments" to Planned Development approvals (Section 21A.54.150 and 20.32.020).

9. Salt Lake City has no record of any modification to the Planned Development approval for the Plat.
10. It is a violation of Salt Lake City Ordinance to convey property contrary to the provisions of the subdivision ordinance. Such a violation is a class C misdemeanor (20.36.020).

11. The Planned Development approval for the Plat was granted as a Conditional Use. The Planned Development approval was for 15,000 square-foot lots. To sell lots of less than 15,000 square feet would be a violation of the Conditional Use approval. According to Salt Lake City

---

[122] 451 South State Street, room 4o6, Salt Lake City, Utah s41 1 1 p.o. box 1454bo, salt lake city, Utah s4 1 1 4-54bo telephone: b01-s35-77s7 fax: 8o 1-535-6 1 74 TDD: bo 1-535-6oz 1 www.slcced.com

ordinance, violations of a Condition Use permit "shall constitute grounds for revocation of the Conditional Use approval" (Section 21 A.54.100).

The above information constitutes my findings based on the documents and ordinances referred to.
If I may be of further assistance, please contact me at (801) 535-7757, or by e-mail at wilf.sommerkorn@slcgov.com. Thank you for your attention to this matter.
__/s/_____
Wilf Sommerkorn
Zoning administrator Salt Lake City planning
CC. Frank Fray, community economic development, Orion Golf Director, building services and licensing, Randy Sorenson, Glendale community council Posted to Web file.

Continued ...

APPENDIX K (3)

SUBDIVISION PERMIT

Abstract,Findings and Order

I, Verene Froisland being first duly sworn, depose and say that I am the Secretary to the Salt Lake City Planning Commission (451 South State Street, Room 406), and that on Thursday, August 6, 1998, Case No. 410-319 by Centennial Park, Ltd. was heard by the Salt Lake City Planning Commission. The applicant requested a conditional use for an industrial planned development located at 4463 West 1730 South in the Centennial Industrial Park Subdivision in an Industrial "M-1" zoning district. Preliminary subdivision approval is also requested for a seven lot plat amendment.

Legal description of property is as follows: Sidewell: 001The N 410FT OF LOT 5, CENTENNIAL INDUSTRIAL PARKPH V 5364-0938 5590-1576 6185-0070 6223-2894 8023-0413 8027-0606, 0609, 0612

It was moved, seconded and passed by unanimous or majority vote that the conditional use be granted.

_/s/_____Verene Froisland Secretary to the Planning Commission, STATE OF UTAH) ss County of Salt Lake)

__/S/__ Luann Calfa. Notary public residing at salt Lake Utah

IT IS THEREFORE ORDERED that approval be granted subject to the following conditions: 1. Three of the lots do not have frontage on a dedicated public street. 2 Three of the lots have approximately 15,500 square feet of lot area, which is less than the 20,000 minimum established in the zoning district.3. The landscaping buffer required along property boundaries interferes with theinternal circulation plan. The modified landscaping is indicated on the submitted plan.

THE FAILURE OF THE APPLICANT TO ABIDE BY THE CONDITIONS OF THIS CONDITIONAL USE SHALL CAUSE IT TO BECOME NULL AND VOID, WHICH IN EFFECT, IS THE SAME AS THE CONDITIONAL USE HAVING BEEN DENIED.

Action Taken By the Planning Commission on Petition No.410-319 at Its August 6 1998 Meeting. Dated In Salt Lake City Utah March 19 1999.

___/S/___Chairperson, Max Smith

___/S/_____Secretary,Verene Froisland

* END OF APPENDIX K*

APPENDIX L (1)

Onyeabor's motion to dismiss

THE LAW OFFICE OF GREGG K. STEPAN, LLC
9075 South 1300 East, Suite 102B
Sandy, Utah 84094 Telephone: 801-572-6969 Facsimile: 801-572-6970
Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

CENTENNIAL POINTE PROPERTY OWNERS ASSOCIATION, Plaintiffs	) Filed Nov. 8th 2004 3.49PM) Salt Lake County
v.	)
Myriam Onyeabor	) Civil No. 040918762
Defendant,	) Judge Stephen Henriod

MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS

Defendant Myriam Onyeabor, by and through its counsel The Law Office of Gregg K. Stepan, LLC, hereby brings the following Memorandum in Support of her Motions to Dismiss.

I. LACK OF STANDING AND SUBJECT MATTER JURISDICTION - RULE 12(b)(l)

A. Introduction. Defendant moves the court for an order dismissing the Plaintiffs complaint in its entirety. The grounds for this motion are that the Plaintiff, Centennial Pointe Home Owners Association,

Inc., lacks standing to bring suit, and therefore, this court lacks jurisdiction

over the subject matter pursuant to Rule 12(b)(l) of the of the Utah Rules of Civil Procedure.[1123] Plaintiff, formerly a Utah nonprofit corporation, was administratively dissolved on September 27, 2001, and the Plaintiffs statutory two year time period for reinstatement, under Section 16-6a-1412 of the Utah Code Annotated, has irreconcilably passed. As such, the Plaintiff is a non-existent legal entity, and therefore, Plaintiff lacks standing to bring suit, and this court lacks subject matter jurisdiction.

B. Argument.

1. Lack of Standing is a Jurisdictional Issue Appropriately Resolved in a Rule 12 Motion to Dismiss.

This court lacks subject matter jurisdiction over the Plaintiffs complaint pursuant to Rule 12(b)(l) of the Utah Rules of Civil Procedure because the Plaintiff lacks standing to bring suit. "Lack of standing is a Jurisdictional issue" that can be raised when it becomes apparent that the court lacks such jurisdiction. *Harris v. Springville.* 712 P.2d 188, 190 (Utah 1986). Thus, lack of standing is appropriately resolved in this Rule 12 motion to dismiss for lack of jurisdiction.

2. Plaintiff Does Not Exist. A Utah nonprofit corporation can be administratively dissolved by the

---

[123] If it is more accurate, or appropriate, Defendant's Motion to Dismiss for the reason that this court lacks subject matter jurisdiction pursuant to Rule 12(b)(l) of the Utah Rules of Civil Procedure is brought, in the alternative, as a Motion to Dismiss for lack of personal jurisdiction over the Plaintiff pursuant to Rule 12(b)(2) of the Utah Rules of Civil Procedure.

Division of Corporations of the Utah Department of Commerce (the "Division") for, among other things, its Failure to file its annual report with the Division or to pay its annual renewal fee. See UCA § 16-6a-1410(1) and (2). A Utah nonprofit corporation that has been administratively dissolved has only two years to apply for reinstatement. UCA § 16-6a-1412(l). A reinstatement, if completed within the two year period, is the only statutory mechanism that reestablishes the corporation and its right to conduct business "as if the administrative dissolution had never occurred." UCA § 16-6a-1412(4).

Plaintiff, Centennial Pointe Property Owners Association, Inc., formerly a Utah nonprofit corporation, was administratively dissolved, pursuant to Section 16-6a-1411 of the Utah Code Annotated, effective September 27, 2001. See Attached Printout of a Business Entity Search from the web site of the Division of Corporations of the Utah Department of Commerce; see UCA § 16-6a-1411(1) and (2). Further, the Plaintiffs statutory two year time period for reinstatement expired without a reinstatement on September 27, 2003, two years after the effective date of its administrative dissolution. Thus, the Plaintiff has been finally dissolved, and it does not exist as a legal entity.

3. The Administratively Dissolved and Not Reinstated Plaintiff Has No Standing to Bring a Suit.

A Utah nonprofit corporation that has been administratively dissolved and that has not filed for reinstatement within two years after the dissolution has no legal standing to bring a law suit. UCA§ 16-6a-1411(3)(a)and 16-6a-1412(l). See also Miller v. Celebration Mining Co.. 29 P.3d 1231, 1239 n.3 (Utah 2001) (Howe, C.J., dissenting) (stating that a contract entered into by a

corporation three years after its administrative dissolution is void as to the corporation); Gas Pump, Inc. v. General Cinema Beverages of North Florida, Inc., 436 S.E.2d 207, 208 (Ga. 1993) (finding that a corporation that was administratively dissolved and not reinstated within the two year statutory period had no capacity to bring a law suit). The applicable statutes provide for the continuance of an administratively dissolved Utah nonprofit corporation only to "wind up and liquidate its affairs" and to provide certain notices to creditors. UCA § 16-6a-1411(3)(a). Further, an administratively dissolved Utah nonprofit corporation has two years in which it may seek reinstatement. UCA § 16-6a-1412(l). Read together, these two statutory provisions provide that the expiration of the two year period for reinstatement ends the nonprofit corporation's existence for any reason. See Gas Pump, Inc., 426 S.E.2d at 208-09 (holding, under corporate statutes substantially similar to the Utah statutes applicable in this case, that the statutes "provide a period of two years in which an administratively dissolved corporation can initiate activities necessary to the winding up and liquidation of its affairs and business. If it is not reinstated during that period, it can take no further action.").

As already set forth above, the Plaintiff, Centennial Pointe Property Owners Association, Inc., formerly a Utah nonprofit corporation was administratively dissolved effective September 27, 2001, and it was not reinstated within the statutory two year period. Thus, the Plaintiffs existence has irrevocably terminated for all purposes, and the Plaintiff has no standing to bring this law suit.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED - RULE 12(b)(6)

A. Introduction. Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, Defendant moves the court for an order dismissing the Plaintiffs complaint in its entirety. The grounds for this motion are that the Plaintiff, Centennial Pointe Home Owners Association, Inc., has failed to state a claim upon which relief can be granted. Each of Plaintiff s three causes of action arise out of Plaintiffs attempts to conduct normal business; however, Plaintiff has no right to conduct normal business. Plaintiff, formerly a Utah nonprofit corporation, was administratively dissolved on September 27, 2001. Therefore, under Section 16-6a-141 l(3)(a) of the Utah Code Annotated, Plaintiff has had no right to conduct any business since the time of its administrative dissolution on September 27, 2001. Further, because the Plaintiffs statutory two year time period for reinstatement, under Section 16-6a-1412 of the Utah Code Annotated, has irreconcilably passed, there can be no manner or mechanism to re-create or re-establish Plaintiffs right to conduct business after September 27, 2001. Thus, Plaintiffs complaint fails to state a claim upon which relief can be granted.

B. Argument.

1. Plaintiff, as an Administratively Dissolved Utah Nonprofit Corporation, Cannot Conduct Normal Business.

Section 16-6a-1411(3) of the Utah Code Annotated provides that:

(3) (a) Except as provided in Subsection (3)(b), a nonprofit corporation administratively dissolved continues its corporate existence but **may not carry on any activities** except as is appropriate to:

(i) wind up and liquidate its affairs under Section 16-6a-1405; and..ii) to give notice-to give notice to claimants in the manner provided in §sections 16-6a-1406 and 16-6a-1407.

(b) If the nonprofit corporation is reinstated in accordance with Section 16-6a-1412, business conducted by the nonprofit corporation during a period of administrative dissolution is unaffected by the dissolution.

UCA § 16-6a-1411(3) (emphasis added). This clearly provides that the only activities that can be conducted by an administratively dissolved corporation must involve the winding up or liquidation of its affairs. An administratively dissolved corporation has not authority to conduct its normal business.

Plaintiff, Centennial Pointe Property Owners Association, Inc., formerly a Utah nonprofit corporation, was administratively dissolved, pursuant to Section 16-6a-1411 of the Utah Code Annotated, effective September 27, 2001. See Attached Printout of a Business Entity Search from the web site of the Division of Corporations of the Utah Department of Commerce. Further, the Plaintiff was not reinstated within the statutory two year time period for reinstatement. See id. Thus, pursuant to Section 16-6a-1411(3) of the Utah Code Annotated, the Plaintiff has had no authority to conduct any activities (except as necessary for winding up or liquidation) since September 27, 2001.

2. Each of Plaintiff s Three Causes of Action are Based on Plaintiffs Statutorily Unauthorized Attempts to Conduct Normal Business.

Plaintiffs First Cause of Action for Breach of Centennial Pointe's CC&R is based upon damages allegedly incurred by Plaintiff while Plaintiff was making assessments in the normal course of its business, despite being in a state of administrative dissolution. See Complaint at ¶¶28, 41.44. there is no indication that the Complaint or in any other filing before this court that the Plaintiff made such s

assessment in an attempt to wind up its affairs. Thus, pursuant to Section 16-6a-1411(3) of the Utah Code Annotated, no assessments could have been lawfully imposed by Plaintiff and no damages could have been lawfully incurred by Plaintiff. As such, Plaintiffs complaint for the First Cause of Action does not state a claim upon which relief can be granted.

As with the First Cause of Action, Plaintiffs Second Cause of Action for Lien for Nonpayment of Common Expenses is based upon damages allegedly incurred by Plaintiff while Plaintiff was making assessments in the normal course of its business, despite being in a state of administrative dissolution. See Complaint at ^ 28, 49, 50. There is no indication in the Complaint or in any other filing before this court that the Plaintiff made such assessments in an attempt to wind up its affairs. Thus, under Section 16-6a-1411(3) of the Utah Code Annotated, no assessments could have been lawfully imposed by Plaintiff and no damages could have been lawfully incurred by Plaintiff. As such, Plaintiffs complaint for the Second Cause of Action does not state a claim upon which relief can be granted.

Plaintiffs Third Cause of Action for Injunctive Relief is based upon actions taken by Plaintiff or its representatives, acting in the normal course of its business, to access certain areas on the Defendant's property, despite the Plaintiff being in a state of administrative dissolution. See Complaint at f^f 54-56. There is no indication in the Complaint or in any other filing before this court that the Plaintiff or its representatives made attempted to access such areas in the course of winding up the Plaintiffs affairs. Thus, under Section 16-6a-1411(3) of the Utah Code Annotated, the Plaintiff and its representatives had no legal authority to access such areas. As such,

Plaintiffs complaint for the Third Cause of Action does not state a claim upon which relief can be granted. 3. Plaintiffs Right to Conduct Normal Business after September 27, 2001 Cannot Be Reestablished or Recreated.

An administratively dissolved Utah nonprofit corporation has two years in which it may seek reinstatement. UCA § 16-6a-1412(l). A reinstatement, if completed within the two year period, is the **only** statutory mechanism that reestablishes the corporation and its right to conduct business "as if the administrative dissolution had never occurred." UCA § 16-6a-l 412(4).

,1 As already set forth above, the Plaintiff, Centennial Pointe Property Owners Association, Inc., formerly a Utah nonprofit corporation, was administratively dissolved effective September 27, 2001, and it was not reinstated within the statutory two year period. Thus, pursuant to Section 16-6a-1411 and 1412, the Plaintiffs authority to conduct its normal business has been and will always remain irrevocably terminated for all purposes since September 27, 2001.

Further, because the Plaintiffs existence has been terminated for all purposes (see Section I, supra) and because the Plaintiff has had no authority to conduct its normal business since September 27, 2001 and Plaintiff cannot revive its authority to conduct normal business (see Section II.B.L, supra), no rights of the Plaintiff are in existence which might be asserted by a new corporate entity that might be formed to avoid a dismissal of this Complaint nor by a member or director of the Plaintiff. Even if some rights of the Plaintiff were in existence (which they are not), the Plaintiff would have no authority, for the same

reasons, to transfer, at this time or any time, any such rights to any other person or entity.

III. MOTION TO VACATE PRELIMINARY INJUNCTION

A. Introduction. Defendant moves the court for an order vacating in its entirety the Preliminary Injunction issued by the court in this case during a hearing on October 18, 2004. If the Plaintiff's complaint is dismissed, there is no complaint to which any preliminary injunction can be associated, and thus, the Preliminary Injunction must be vacated.

B. Argument.

Because the Plaintiffs existence has been terminated for all purposes (see Section I, supra) and because the Plaintiff cannot revive its authority to conduct normal business (see Section II.B.l., supra), the Plaintiff has no authority or standing to request a Preliminary Injunction in this case. Dated this 8th day of November, 2004.

THE LAW OFFICE OF GREGG K. STEP AN, LLC

_/s/_____

By: Greg K. Stepan
Attorney for defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2004,1 served the foregoing **APPEARANCE OF COUNSEL** by causing a true and correct copy thereof to be mailed, via United States Mail, postage prepaid, addressed to the following parties:

Ray M. Beck Edward T. Vasquez
Cohne Rapp port Segal PC
P o box 11008
SLC UT 84147

__/s/_____
Greg Stepan

APPENDIX L (2)

Onyeabor's Reply memorandum

THE LAW OFFICE OF GREGG K. STEPAN, LLC
9075 South 1300 East, Suite 102B
Sandy, Utah 84094 Telephone: 801-572-6969 Facsimile: 801-572-6970
Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

CENTENNIAL POINTE PROPERTY OWNERS ASSOCIATION, Plaintiffs	) Filed Dec 13 2004) Salt Lake County)
v.	)
Myriam Onyeabor	) Civil No. 040918762
Defendant,	) Judge Stephen Henriod

DEFENDANT'S REPLY MEMORANDUM IN OPPOSITION TO (I) PLAINTIFF'SMEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND (II) PLAINTIFF'S MOTION TO AMEND AND SUBSTITUTE PARTIES

Pursuant to Rule 7(c)(l) of the of the Utah Rules of Civil Procedure, Defendant replies in opposition to (i).Plaintiff s Memorandum in Opposition in Defendant's Motions to Dismiss and_ (ii)- Plaintiff s Motion to Amend and Substitute Parties.

I. INTRODUCTION

Plaintiff's arguments against dismissal lack merit. These motions cannot be resolved through a substitution of parties, as a matter of liberal pleadings and judicial economy, as Plaintiff would have this Court believe. See Plaintiffs Memorandum in Opposition ("Plaintiffs Memorandum") at 2, 7 and 13. It is a well-settled principal of law that Corporations exist and have powers **only** pursuant to statute. See, e.g., Weyeth Hardware & Manf. Co. v. James-Spencer-Batement Co., 15 Utah 110, 47 P. 604 (Utah 1897) ("A corporation is a mere creature of law, and has such powers only as are expressly granted by the state . . . ."). Plaintiff apparently wishes that this Court ignore the nonprofit corporation enabling statutes that are applicable in this case. By statute, the nonprofit corporation in this case had no authority to "carry on any activities" (see UCA § 16-6a-141 1(3)). Defendant's motions to dismiss should be granted.

II. PLAINTIFF IGNORES THE APPLICABLE ENABLING STATUTES

A. Corporations have no legal right to carry on activities if administratively dissolved. By statute, the nonprofit corporation in this case had no authority to "carry on any activities" (see UCA § 16-6a-141 1(3)). Plaintiff did not respond directly to this statute nor to the cases did Defendant cite interpreting this statute in support of Defendant's Motions to Dismiss. In fact, Plaintiffs admit that the corporation in this case cannot be reinstated. See Plaintiffs Memorandum at 12. Instead, Plaintiff relies on a case involving an **unincorporated** entity under the Utah Name Statute. See Plaintiff' s Memorandum at 8-10 (citing *Graham v. Davis County Solid Waste Management An Energy Recovery Service District*, 979 P.2d 363 (Utah Ct. App. 1999). Plaintiff mistakenly believes that the principals of liberal pleading relied upon in Graham can overcome the clear

dictates of the nonprofit corporation statutes of this case. Graham is distinguishable from this case because Graham did not involve an incorporated entity and the statutes governing incorporated entities. As such, Graham should not be relied upon by this Court. It is a well-settled principal of law that Corporations exist and have powers **only** pursuant to statute. See Weyeth, supra.

B. A dissolved nonprofit corporation that has no right to "carry on any activities" possesses no rights to transfer to some other person or entity. As a basic matter of logic, you cannot give away something that you do not possess. Yet, that is essentially what the Plaintiff desires in this case: transfer to a successor the non-existent rights of the dissolved Association. Besides being logically impossible, such a course of action would render the applicable enabling statutes completely meaningless. An administratively dissolved Utah nonprofit corporation has two years in which it may seek reinstatement. See UCA § 16-6a-1412(l). A reinstatement, if completed within the two year period, is the **only** statutory mechanism that reestablishes the corporation and its right to carry on activities. See UCA § 16-6a-1412(4). Allowing the corporation's rights to carry on activities to somehow reappear and be transferred to another after the two year reinstatement deadline would render meaningless the two year reinstatement deadline in the statute. However, "Utah courts have a duty to interpret statutes so that they will not be rendered meaningless." In re E.H., 880 P.2d 11, 13 (UT Ct. App. 1994). Thus, there can be no successor to the rights of the dissolved Association.

III. NO PARTY, OTHER THAN THE ASSOCIATION, HAS THE RIGHT UNDER THE CC&Rs TO MAKE ASSESSMENTS AGAINST LOT OWNERS AND TO SEEK AN ACCOMPANYING LIEN FOR NONPAYMENT.

____Under the-CC&Rs, assessments and liens for nonpayment of assessments—be issued and collected **only** by the Association. See CC&Rs at §§ 7.6(a), 8.1, 8.6 and 8.7. This provision makes sense—allowing one owner, acting alone; to make an assessment against another owner would allow obvious opportunity for abuses. Thus, pursuant to the specific dictates of the CC&Rs, the Defendant has a contractual obligation to pay assessments **only** to the Association. The Association, however, was dissolved and had no legal right to "carry on any activities" (see UCA § 16-6a-1411(3)) during the time period when the assessments at issue were made by the non-existent Association. To now require the Defendant to recognize and pay assessments to someone other than the Association would render the nonprofit corporation enabling statutes meaningless—it essentially would give the Association the right to make assessments when it had no right to "carry on any activities." Thus, during the time period of the dissolution, Defendant can have no obligation to pay any assessments for expenses incurred on behalf of the dissolved Association. Further, allowing a lot owner to step into the shoes of the dissolved Association, for the express purpose that the Defendant be held liable for expenses incurred on behalf of the dissolved Association, would squarely contradict the Utah Supreme Court's specific finding that:

> As to corporations that have been suspended and not reinstated, we hold that officers and directors

> who continue the business of s suspended corporation are personally liable for all debts and liabilities arising from those operations that are a continuation of the types of activities the corporation performed.

Murphy v.Crosland, 915 P.2d 491, 495 (Utah 1996) (quoting Steenblik v. Lichfield, 906 P.2d 872, 878 (Utah 1995)). Here, Mr. Raille was an officer and director of the Association and was making assessments upon Defendant on behalf of the non-existent Association. As Murphy indicates, Mr Raille, not the Defendant, should be responsible for his own negligence regarding the lapse of the registration of the Association. Defendant did not allow the Association to be administratively dissolved, as such; she should not bear the burden of the consequences.

IV. CC&Rs ALLOW AN AGGRIEVED LOT OWNER TO ENFORCE THE CC&RS "IN A PROPER CASE." LEBR IS NOT AGGRIEVED AND THIS IS NOT A "PROPER CASE."

Under the CC&Rs, an **"aggrieved"** owner, **"in a proper case"**, can bring an action against another owner (see CC&Rs at § 18.2, emphasis added). LEBR is not aggrieved, and this is not a proper case. As discussed above, neither LEBR (and its owner Mr. Raille) nor any other lot owner has the authority under the CC&Rs right to make and collect assessments and ask for a lien for nonpayment of assessments. Further, as also discussed above, the rights of the Association in the CC&Rs cannot be assumed by any other party because to do so would render the enabling statutes meaningless and violate Utah Supreme Court precedent in *Murphy*. Thus, this case clearly would not be a "proper case" to allow LEBR to enforce the

Association's rights to make assessments and request a lien. Further (and suspiciously), LEBR (the proposed substitute Plaintiff) and its owner Mr. Raille have never attempted to act individually in this case until this point.Based on the original Complaint, all causes of action in this case, including the requested injunction for access to the utility room, are based upon actions taken by Mr. Raille or other individuals who were purporting to act at all times on behalf of the Association. See, e.g., Original Complaint at §§54-56. Thus, LEBR and Mr. Raille are not truly aggrieved within the meaning of the CC&Rs. Further, allowing Mr. Raille at this late date to essentially impose onto the Defendant Mr. Raille's own liability for acting on behalf of a dissolved Association (see Murphy, supra) would clearly not be a "proper case"

THE LAW OFFICE OF GREGG K. STEPAN, LLC
_/s/_____ Gregg Stepan attorney for Defendant

APPENDIX L (3)

Respondent's Motion to substitute Parties

Jeffrey L. Silvestrini (Bar No. 2959)
RayM. Beck (Bar No. 3798) Edward T. Vasquez (Bar No. 8640) **COHNE, RAPPAPORT & SEGAL P.C.**
257 East 200 South, Suite 700 P.O. Box 11008
Salt Lake City, Utah 84147-0008 Telephone
(801) 532-2666 Facsimile (801) 355-1813
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

CENTENNIAL POINTE PROPERTY OWNERS ASSOCIATION,	) **PLAINTIFF'S REPLY MEMORANDUM IN**) SUPPORT **OF MOTION TO AMEND AND TO**) SUBSTITUTE) PARTIES
v.	) Oral argument Request
Myriam Onyeabor	) Civil No. 040918762
Defendant,	) Judge Stephen Henriod

Plaintiff Centennial Pointe Property Owners Association and proposed substituted Plaintiffs LEBR Associates, LLC and Centennial Pointe Property Owners Association, Inc. (registered on November 29, 2004), by and through their counsel, COHNE, RAPPAPORT & SEGAL P.C., hereby bring the following Reply Memorandum in Support of Motion to Amend and to Substitute Parties

ARGUMENT

I. ALLOWING PLAINTIFF LEAVE TO AMEND TO SUBSTITUTE PARTIES IS APPROPRIATE AND WARRANTED.

This Court plainly has the authority to allow Plaintiff leave to amend to substitute the parties in this matter to cure the defect in its Complaint. The Utah Court of Appeals' decision[1124] in *Graham v. Davis Co. Solid Waste Mgmt. & Energy Recovery Special Serv.*, plainly shows that it is appropriate, given Utah's liberal pleading rules, and in the interest of judicial economy to allow Plaintiff leave to amend. 1999 UT App 136,^ 16, 979 P.2d 363. Defendant attempts to distinguish *Graham* on the conclusory bases that *Graham* involved a unincorporated association, and that, pursuant to statute, a dissolved nonprofit corporation has no authority to carry on any activities. *See* Defendant's Reply Memorandum at 2. However, the unincorporated association in *Graham* was expressly precluded from bringing or maintaining a lawsuit. A review of the Assumed Name Statute cited by the court of appeals in *Graham* expressly states that a business that has not complied with the statute *"shall not sue, prosecute, or maintain* any action, [or] suit... in any of the courts of this state." Utah Code Ann. § 42-2-10(1) (emphasis added). The original plaintiff in *Graham* plainly did not have either the authority or the standing to bring the action. Further, the original plaintiff in *Graham* did not have the authority to maintain the action by seeking leave to amend. Nevertheless, the court of appeals held that leave to amend was "a permissible means of remedying

---

[124] 'In its original Memorandum, Plaintiff mistakenly referred to *Graham* as a Utah Supreme Court case.

the deficiencies" in the complaint. *Graham,* 1999 Ut App 136 at 116. This was due to the identity of interest between the original plaintiff and the substitute plaintiff and that the substitution would not "change] the ultimate liability sought to be imposed." *Id* at f 16, 18.

Here, Plaintiff has admitted that it was administratively dissolved. Similar to the unincorporated association in *Graham,* Plaintiff is attempting to cure the deficiency in its Complaint. This will be accomplished if this Court allows Plaintiff leave to amend its Complaint. Further, as set out in Plaintiffs original Memorandum, the substantial identity of interest between Plaintiff and the proposed Plaintiffs makes the substitution wholly proper and warranted. Defendant's attempt to distinguish *Graham* based on the type of business entity is superficial. The court's reasoning and analysis in *Graham* are plainly applicable to the present matter.

A. Plaintiff Is Allowed Leave To Amend As A Matter Of Course.Defendant has not answered Plaintiffs Complaint. Defendant's Motion to Dismiss is not a "responsive pleading" under Rule 15 of the Utah Rules of Civil Procedure. *See Heritage Bank & Trust v. London,* 770 P.2d 1009, 1011 (Utah Ct. App. 1989). Pursuant to Rule 15(a), a party may amend his pleading once as a matter of course before a responsive pleading is served. *See* Utah R. Civ. P. 15(a). In *Heritage Bank,* the court went so far as to explain that the "language of the rule entitles a party to amend [,] . . . [this holds true even where the party with a right to amend . .. Moves for leave to amend." *Id.* As such, Plaintiff is entitled to leave to amend, and, consistent with the court of appeals' ruling in *Graham,* substitution of the parties is an appropriate amendment. Accordingly, Plaintiff respectfully

requests that this Court grant its Motion for Leave to Amend.

II. LEBR IS A PROPER PARTY TO THIS LITIGATION.Centennial Pointe's CC & Rs plainly provide that an aggrieved owner can bring an action for sums due, damages, and injunctive relief. *See* Centennial Pointe CC & Rs 18.2. LEBR is the quintessential aggrieved owner. First, Defendant is delinquent on her Centennial Pointe assessments, meaning that Centennial Pointe's owners, including LEBR, have had to shoulder additional costs to ensure that Centennial Pointe continues to be maintained. Quite simply, for example, someone needs to ensure that snow is plowed, the common areas are maintained, light bulbs in the common areas are replaced, and the accessways are maintained. That someone has not been Defendant, who has been content to let that burden fall on LEBR and the other Centennial Pointe owner.

Second, as an owner, LEBR has an express access easement to the utility room located on Defendant's property. Defendant has interfered with that easement. Defendant has also interfered with LEBR's easement to use and enjoy Centennial Pointe's common areas. In all, the CC & Rs vest authority in an aggrieved owner to bring suit and LEBR is plainly an aggrieved owner.

CONCLUSION

For the foregoing reasons, Plaintiff and proposed Plaintiffs respectively request that this Court grant Plaintiffs Motion to Amend and Substitute Parties.

DATED this 21st day of December, 2004___/s/_____

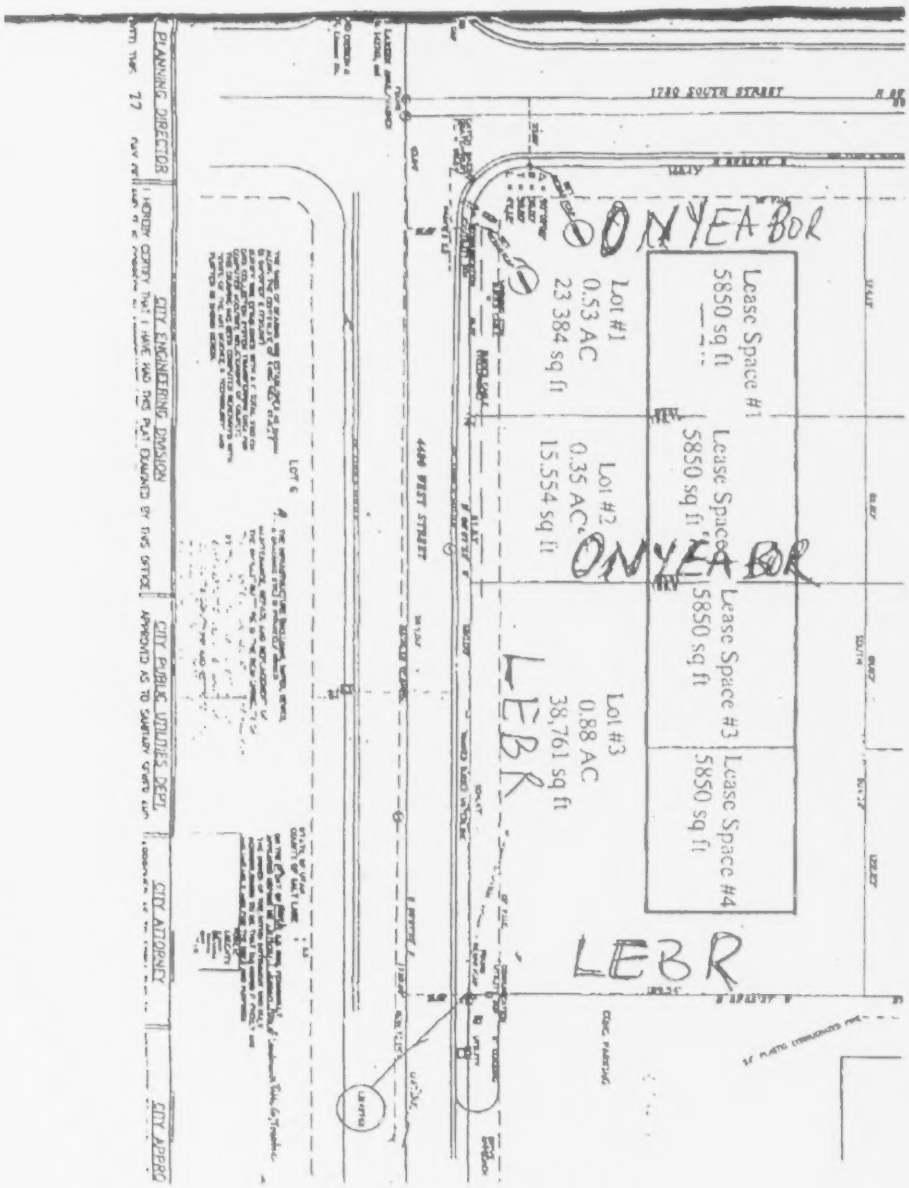
Jeffrey L Silvestrini, Ray beck, and Edward Vasquez.

Attorneys for proposed plaintiffs.

END OF APPENDIX L

APPENDIX M (1)

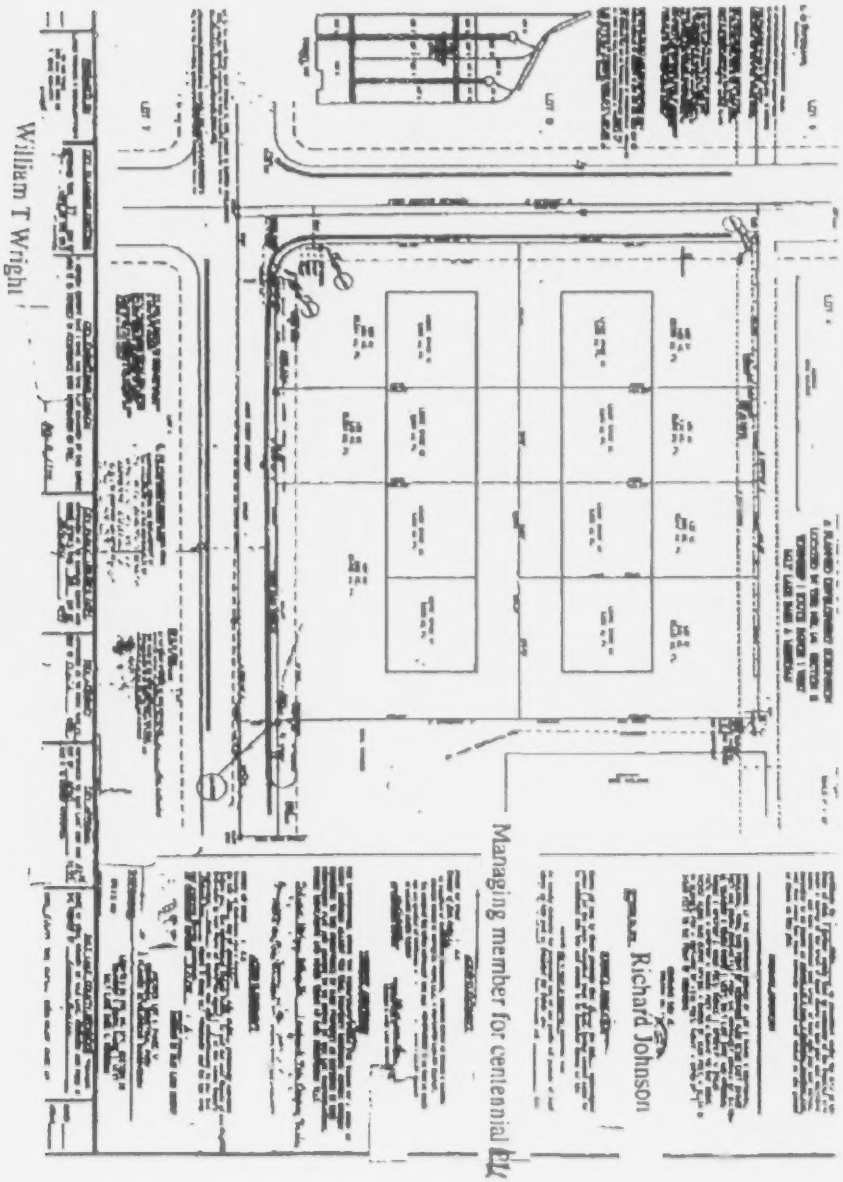
PLAT MAP CENTENNIAL POINTE –(Record at 1453)
Continued …



BEST AVAILABLE COPY

APPENDIX M (2)

PLAT MAP-CENTENNIAL POINTE



APPENDIX M (3)

PLAT MAP- CENTENIAL POINTE
DEDICATIONS- ACKNOWLEDGMENTS- Right corner
Continued...

****

SURVEYOR'S *CERTIFICATE*

Do hereby certify that *I am* a *Registered- civil engineer and Land* Surveyor. And that I hold Certificate No. 152956 as prescribed under the laws *of the State of Utah. I further certify* that *by authority of the* Owners, / have made a survey of *the* tract *of* land shown on this plat and described below, and have subdivided said tract *of* land into lots and streets, hereafter to be known as AMENDED LOT 5 PHASE 5 CENTENNIAL INDUSTRIAL PARK and that same has been *correctly surveyed* and stated on the ground as shown on this plat

BOUNDARY

Beginning At The Northeast Corner of Lot 5 Phase 5 Centennial Industrial Park, Said Point Of Beginning Also Being East 2441.08 Feet And South 2855.42 Feet From The Northwest Corner of Section 18, Township 1 South Range 1 West, Salt Lake Base And Meridian) Thence S 00'07'23' E 410.00 Feet) Thence S 89'52'37' W 375.00 Feet Thence N 00'07'23' W 380.00 Feet To A Curve To The Right) Thence Along Said Curve Having A Radius Of 30.00 Feet, A Delta Of 90 Degrees, For A Distance of 47.12 Feet) Thence N 89*52'37" E 345.00 Feet To The Point of Beginning.

CONTAINS 3.52 AC. 153,556 sq.

SEPTEMBER 24, 1996

****

OWNER'S DEDICAION

Known all men by these presents that the undersigned owner ( ) of the above described tract of land, having caused same to be subdivided into lots and streets to be hereafter known as the AMENDED LOT 5 PHASE 5 CENTENNIAL INDUSTRIAL PARK do hereby dedicate for perpetual use of the public all parcels of land shown on this plat as intended for Public use. ID witness has hereunto set this 28th Day of September A.D, 1998

_/s/_____Donald Sanborn

Managing member for Centennial Pointe LLC

ACKNOWLEDGEMENT S.

State Of Utah County Of Salt LakeOn This Day Of March 1999 Personally, Appeared Before Me Donald R. Sanborn, Managing Member of Centennial Pointe LLC A Utah Limited Liability Company. The Signer Of Written Instrument Who Duly Acknowledged To Me That He Signed For And On Behalf Of Centennial Pointe, LLC, A Utah LIMITED Liability Company as managing member Thereof.

07-17-2000

/s/ Michele Liechty
Notary public residing in salt Lake County

TRUStEE DEDICATIQN

THE UNDERSIGNED, BEING THE

IndyMac Mortgage hlding LandMark Title

/s/ maria roa /s/ Jeffrey Jensen

THE UNDERSIGNED, BEING THE

BENEFICIAry9trustee) RY/UNDER THE TERMS OF A DEED OP TRUST, SECURED AGAINST THE REAL PROPERTY DESCRIBED HEREIN, HEREBY CONSENTS TO THE SUBDIVISION OF SAID PROPERTY AS DEPICTED IN THIS SUBDIVISION PLAT AND AGREES TO BE BOUND BY THE LOT CONFIGURATIONS, STREET DEDICATIONS AND OTHER TERMS OF SAID SUBDIVISION PLAT.

ACKNOWLEDGEMENT

STATE OF UTAH : S.S.
County of Los Angeles
On the 7th Day of march, 1999,. *personally appeared before* me, the undersigned *Notary* Public, in and for said County *of Los Angeles,* in said State of CA, The signer *( ) of the* above Owner's Dedication one in number, who duly acknowledged to me that Maria Roa signed it *freely* and voluntarily and for the uses And purposes therein mentioned. Commission expires; 11/7/ 1998

.___/s/ Debra Kay Myers Notary Public Residing in salt l Lake County

AMENDED LOT 5 PHASE V CENTENNIAL INDUSTRIAL PARK A PLANNED DEVELOPMENT SUBDIVISION

LOCATED IN THE NW. 1/4 SECTION 18
TOWNSHIP 1 SOUTH RANGE 1 WEST

SALT LAKE COUNTY RECORDER

APPENDIX M (4)

PLAT: CENTENNIIAL POINTE Upper Left Corner--
Public Utility Easements.

PUBLIC UTILITY EASEMENTS

LOT 9

Notice to Purchasers
EXCEPTIONS

1. TERMS,COVENANTS,CONDITIONS,RESTRICTIONS,EASEMENTS AND/OR RIGHTS OF WAY AS CONTAINED IN THAT CERTAIN INSTRUMENT DATED DECEMBER 30, 1968 AND RECORDED DECEMBER 30, 1968 AS ENTRY NO. 2272001, IN BOOK 2718, AT PAGE 631, AND BY THAT CERTAIN CORRECTION INSTRUMENT RECORDED MAY 20, 1969 AS ENTRY NO. 2288434 IN BOOK 2755 AT PAGE 600 OF THE OFFICIAL RECORDS.

2. THE FOLLOWING EXCEPTION AND RESERVATION CONTAINED IN THAT CERTAIN SPECIAL WARRANTY DEED RECORDED JUNE 14, 1991 AS ENTRY NO. 5083489, IN BOOK 6336 AT PAGE 2276 OF THE OFFICIAL RECORDS WHEREIN KULMER & SCHUMACHER APPEARS AS THE GRANTOR AND CENTENNIAL PARK, LIMITED APPEARS AS THE GRANTEE, TO WIT:

"GRANTEE FOR ITSELF, ITS SUCCESSORS AND ASSIGNS, AGREE TO JOIN IN ANY PETITION TO SALT LAKE CITY THAT MAY REASONABLY BE REQUIRED TO ESTABLISH A LOCAL IMPROVEMENT DISTRICT FOR STREET LIGHTING IN CENTENNIAL INDUSTRIAL PARK AND GRANTEE FURTHER AGREES, FOR ITSELF, ITS SUCCESSORS AND ASSIGNS, TO ASSUME GRANTEE'S PROPORTIONATE SHARE OF ASSESSMENTS LEVIED BY SALT LAKE CITY UPON THE LANDS DESCRIBED IN EXHIBIT "A" FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF SAID STREET LIGHTING SYSTEM."

3. AVIATION EASEMENT TO SALT LAKE CITY CORPORATION FOR A PERPETUAL AND ASSIGNABLE EASEMENT FOR THE FREE AND UNRESTRICTED PASSAGE OF AIRCRAFT OF ANY AND ALL KINDS NOW OR HEREAFTER DEVELOPED FOR THE PURPOSE OF TRANSPORTING PERSON PROPERTY THROUGH THE AIR, IN, THROUGH, ACROSS AND ABOUT THE AIRSPACE, OVER THE REAL PROPERTY DESCRIBED IN SCHEDULE "A" HEREOF, AS DISCLOSED BY INSTRUMENT DATED JULY 7, 1938 AND RECORDED JULY 16, 1938 AS ENTRY NO. 7029037, IN BOOK 9038, AT PAGE 595 OF THE OFFICIAL RECORDS.

APPENDIX N

AFFIDAVIT- ALEXANDER UDEH (Record at 2143)

MYRIAM N ONYEABOR (Pro se)
P.O 521297
Salt Lake City UT. 84152
801-259-1195
FAX 801-487-9005

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY STATE OF UTAH

CENTENNIAL POINT
PROPERTY OWNERS ASSOCIATION AND LEBR. ASSOC. LLC.
v.
MYRIAM ONYEABOR.
Plaintiff.,
v.
Bruce Raile and Jennifer Clark

Donald Sanborne.

Case No 040918762
Judge Faust

STATE OF UTAH:
Alexander Udeh, being duly sworn and upon oath and states the following:

1) That I am over the age of 18, capable and competent to testify in a court of law.

2. That I have personal knowledge of the incidents Involved in this case and can testify to them

3. That I am Myriam Onyeabor's son and that we purchased Centennial Pointe Lot 1and Lot 2 when I was 13 years old.

4. That I have helped my mother on several occasions on Lots 1 and 2.

5. That I was witness to such occasions when my mother would ask employees of Sun optics/LEBR to move their vehicles out of the entries into Lot 1and 2 and the employees would refuse to do so or ignore my mother

6. That one day, in 2004, I went to the warehouse with my mother and there was a Qwest man parked by the utility room.

7. My mother said to me that they have put some more signs on the building after the Police took the old signs down only days before.

8. That my mother and I walked up to the Qwest man ands my mother asked the Qwest man if he knew who put the signs on Lot one indicating it belonged to Qwest Communication or Centennial Pointe, and the Qwest man said that it was the guys down there, pointing towards Mr. Raile's building

9. That my mother, asked if Qwest Communication knew anything about the signs or if he was connected to putting signs on her Lots. My mother asked, "Is Qwest saying my building belongs to them too?"

10. That my mother [Myriam Onyeabor] asked if she could speak to the Qwest man's supervisior and if the Qwest man could put the Qwest man's supervisor on the phone

11. My mother only asked the Qwest man about the signs and never asked the Qwest man not to do his job or get out of the utility room. My mother pointed to the wires saying, "That is what belongs to Qwest communication not the building."

12. That instead of calling the supervisor, the Qwest man called Mr. Raile and his wife, and they both came out shouting at my mother, saying she had no right taking down the signs.

13. I have heard Mr. Raile yelling at my mother a few times right on Lots 1and 2 and I wanted to confront him but my mother held me back.

14. The day that the Qwest man was there, Raile and his wife were yelling at my mother, charging at and following my mother, because she took down the signs they left on her building.

15. That I wanted to go and make them stop but my mother pulled me towards the back of the building to avoid confrontation.

16. As a result of how Mr. Raile and his workers are treating my mother at Centennial Pointe, she has been through bouts of illness, whereas she used to be a very strong healthy woman.

17. That I was supposed to take over the warehouse when I turned 18 but my mother does not want my brother or I down there anymore by ourselves because Mr. Raile might come to pick fights with us.

18. That my mother's mental condition after the business closed was very bad.

19. That my mother would sit sometimes and gaze for hours and hardly eat for days.

20. That I was forced to calmly uncles and tell them that my mother would sit in her s room for days and cry.

21. That my mother took care of us prior to her conflict with Mr. Raile and his employees but now I was taking care of my mother.

22. That my mother was very sick for a few days after the business closed.

23. That my mother has completely changed since her illness and since the company closed.

24. That my brother, my mother and I always mowed the lawn when the workers, David, Robinson, David's brother Gary or all the other workers could mow the lawn.

25. That my younger brother, my mother and I have had to mow the lawn an entire summer when my mother's workers were too busy to do it.

26. That Mr. Raile knew we were the ones mowing the lawn because I have seen him go by several times as we worked.

27. That in 2004, an employee of home depot had sold my mother and I some substance to put on the lawn in order to prevent insects. The same

employees asked us to leave the 'stay off the grass' signs to protect humans and pets.

DATED THIS___22_____DAY OF June, 2007

___/s/_____

Alexander Chinedum Udeh

SUBSRIBED AND SWORN to before me, this 22 day of June 2007

___/s/_____

Mathew shell
NOTARY PUBLIC

State of Utah
Salt Lake City Utah 84111
My commission expires August 10 2010

APPENDIX O

AFFIDAVIT OF Myriam Onyeabor (Record at 1478)

MYRIAM N ONYEABOR (Pro se)
P.O 521297
Salt Lake City UT. 84152
801-259-1195
FAX 801-487-9005

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY STATE OF UTAH

CENTENNIAL POINT PROPERTY OWNERS ASSOCIATION AND LEBR. ASSOC. LLC.
v.
MYRIAM ONYEABOR.
Plaintiff,
v.
Bruce Raile and Donald Sanborn.

Judge Randall Skanky

Case No 040918762

STATE OF UTAH:
Myriam Onyeabor, being duly sworn and upon oath deposes and states the following:

1) That I am over the age of 18, capable and competent to testify in a court of law.
2) That I have personal knowledge of the incidents involved in this case and can testify to them.
3) That I am the owner of Lots 1 and 2 of Centennial Pointe Industrial Park, a Salt Lake City subdivision
4) The problems between Mr. Raile/LEBR/Sun Optics started soon after they moved into Lot 3 and

also ended up occupying the areas around my Lots one and two, acting as though my property were their recreational area.

5) That I immediately complained about it in 2001, to the owner of Lots 4, 5, 5, 7, Mr. Bezdijan, who assured me that due to their number (perhaps 30 workers) they might just be in the process of settling in and to give them time.

6) By 2001, my workers and I were now having problems with them and I asked them to vacate our front doors and they would adamantly state that Sun Optics/Mr. Raile/LEBR or whoever was in charge told them that it was all 'community property.' And they were not to pay attention to me or my workers. They would adamantly refuse to move their vehicles, even when we had emergencies.

7) That I was now having heated arguments with Raile/Sun Optics/LEBR at the meetings as I explained that they were impeding my business which was a warehouse by blocking the doors.

8) That I remember asking them specifically several times why they did not like the property they bought and went ahead and bought it anyway.

9) That I was the first to buy property on Centennial Pointe and got the best because it is a case of "first come first serve."

10) That I referred Mr. Raile constantly to the Plat which is very clear about "LOTS."

11) That in 2001, Mr. Bezdijan called me on a weekend, stating that he had to see me because it was an emergency. I gave him my address and said he could come.

12) That Mr bezdijan told me that he and Mr Raile were having arguments because of the "communal maintenance," we had going on at that time. He said, "This man just roars."

13) That I agreed with Mr. Bezdijan that Mr. Raile was controlling, intrusive and not keeping his numerous workers on their premises. Mr. Bezdijan complained about boxes flying all over his property with the Sun Optics label on them. I promised to vote with him.

14) That these grievances were expressed at the emergency meeting that followed. So, we finally, agreed that everyone do their own maintenance and stay out of everyone else's business and life.

15) That it was obvious that Raile was upset about the development. He expressed something to the effect that he wanted all the lawns to look alike but we did not have his kind of money and we told him that. He also said there had to be easeways and flow of traffic.

16) His Lots had exits into the streets and I asked him to make his own arrangements with what he bought rather than attempting to force the rest of us into accommodating his needs.

17) That I felt he wanted the entire premises designed for him in order to accommodate his

colossal trailers. I suggested the trailers come through his entry and through the back rather than disrupting everybody else's businesses.

18) That I felt that their needs should not interfere with my property rights and burden me.

19) That I had my very own designs and business needs too and that was why I invested that type of money in the property in the first place.

20) That the problems between owners simmered until it was clear that Bezdijan was going to sell his property.

21) That the LEBR/Sun Optics employees were now all over the Onyeabor property engaging in the some of the acts that I had referenced in the may 22 2002 letter (EXHIBIT 8). Things like leaving lunch scraps all over the Onyeabor property and even repairing a car right in front of my door.

22) Once again, the information I got from the workers of Mr. Raile/LEBR was that the establishment of LEBR/Sun Optics asked them to ignore our pleas and park and do as they pleased.

23) That in 2002 legal counsel asked me to write Raile/Sun Optics/ LEBR an official letter just in case I no longer had the protection that Paul Bezdijan provided me and Raile decided to resume the communal maintenance or harassing behavior.

24) That the letter officially stated that if Raile/Sun optics/LEBR were to maintain any part of

my property against my wishes, Raile/Sun Optics/ LEBR would have to pay.

25) That Mr Bezdijan later sold Lots 4, 5, 6 to Raile/sun Optics/ LEBR and soon after that, Mr. Raile became my "landlord and master." That Mr. Raile and sometimes his wife would come on numerous occasions, screaming, barking orders and insults at me, and humiliating me on my own property in a manner I had never been humiliated before.

26) That I was not even allowed to do the normal things a property owner, especially a property of price and caliber, could do. I went into my property and came out like a beggar, oftentimes to the giggles and mockery of LEBR's employees who had been told that I was crazy, that the property was actually theirs or "community property."

27) At that time, mental stress was a euphemism for what I really felt. My workers asked me if I really bought the property, so did my children and other family members.

28) By 2003 and early 2004, I was so depressed I started to avoid Centennial Pointe. I was not coming to work as often. Lawsuit was easy to talk about but every real estate attorney I spoke to had projected it would cost me $40,000-$100, 000 and a single mother does get involved in a lawsuit unless the money is in the bank and I put all my money in the building. So I put it off.

29) That Ms Clark had jumped into my office with the intent to fight me, and the reason there was no

fight was because I kept moving away from her, and avoiding her threatening gestures. That the name-calling was to provoke me even further and see if that would get me to fight.

30) That on August 13th of 2004, out of desperation I decided to get their attention by threatening to lock the utility room, show them I actually owned it and Mr. Raile sued me soon after that.

31) That I never locked the utility room

32) That I found out after the lawsuit that there had been a CC&R change in August 2000 at the request of Mr. Raile of LEBR/Sun Optics.

33) I hereby affirm my prior affidavit (here attached) with regards to the August CC&R [Restated].

34) That I still did not want the situation to escalate and offered LEBR/Sun Optics to accept the Plat of the City is still the binding document as to what we own. I offered that the CC&R of August be changed to reconcile with the Plat map or just resort back to the April CC&R, and accept the Plat has final say as to what we own. They refused the offers.

35) That in December of 2004, I was now in deep depression. I was so ill my family offered to come in and pay the mortgage. I had to close the company down and let go of my workers.

36) That for a woman like me to be crying while talking to men I knew in a business environment, as

well as in the presence of my sons, I raised to be strong men, indicates I had deteriorated to the lowest point of my life.

37) That my older son was supposed to take over the company after turning eighteen, so that I can return to teaching, but I don't dare send him over there until there is restraint on Mr. Raile.

38) That my children, my workers and I, had done my own maintenance on my two Lots until after the first hearing in front of Judge Henriod, when Mr. Raile insisted on doing it and we let him be.

39) That my first son, for whom this company was started is now disillusioned about taking it over afraid, as I am, about hostility from Plaintiffs

40) That every statement I made about my mental condition is backed by the fact that I am qualified in the areas of mental health and disorder and knew what was going on with me.

41) That when I did recover a little, I wanted to reopen my business but could not get a loan on the property because Mr. Raile had liens all over it.

42) That I am forced to do this testimony by myself because all the experts charge money and some need to be flown to Utah, and I do not have the funds to pay an expert.

43) That I leave it up to the discretion of the Court to either consider this to be my personal statement about what I went through, what decisions I had to made to overcome the mental trauma that I

experienced. Or perhaps, the court could view it as an expert opinion from Myriam Onyeabor. The Court may also view this as a simple self-report from Myriam Onyeabor and make a determination based on it. (statement attached to affidavit)

DATED THIS____13____DAY OF December, 2006

___/s/_____
Myriam Onyeabor

SUBSRIBED AND SWORN to before me, this 13 day of December 2006
___/s/_____

Frank F. Stringham
NOTARY PUBLIC

State of Utah
1355 east 5360 south
Salt Lake city Utah 84117
Oct 4th 2008
State of Utah

APPENDIX P #1

(Record at 1462)
LEBR'S COLLOSAL TRAILRS IN VARIOUS FORMS BLOCKADING ENTIRE PREMISES. CC&R 18.2 forbids trailers

Typical scenario.

APPENDIX P #2
LEBR colossal trailers blockading entire premises

(Record at 1464)

The entire subdivision is "community property "for LEBR storage -Typical scenario. CC&R 18.2 forbids trailers

*****Other photos at addendum II, Exhibit 15-0pening Brief.**

Appendix P #3

(Record at 1472)

LEBR's utility vehicle right infront of Ms Onyeabor's front office. Photo was taken from office entrance. The spot is Onyeabor's property, LEBR calls it "community property" – LEBR employees often come in scores and refuse to move-Typical scenario.

Appendix P #4

(Record at 2163)

This is LEBR's vehicle blocking the entry into back of Onyeabor's building 2. The spot is part of Onyeabor's lot. LEBR says it is "common areas," they don't have to move." This is typical scenario.

*****This incident was supported by Onyeabor's supplemental affidavit 2, Addendum II, Exhibit 7. Opening Brief.**

APPENDIX Q

AFFIDAVIT OF JAMES WALKER (Rec. at 2148)

MYRIAM N ONYEABOR (Pro se)
P.O 521297
Salt Lake City UT. 84152
801-259-1195
FAX 801-487-9005

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY STATE OF UTAH

CENTENNIAL POINT
PROPERTY OWNERS ASSOCIATION AND LEBR. ASSOC. LLC.
v.
MYRIAM ONYEABOR.
Plaintiff ,.
v.
Bruce Raile and Jennifer Clark

Donald Sanborne.

Case No 040918762
Judge Randall Skanky

STATE OF UTAH:
James Walker being duly sworn and upon oath and states the following:

1) That I am over the age of 18, capable and competent to testify in a court of law.

2. That I have personal knowledge of the incidents Involved in this case and can testify to them

3 That I am the CEO of walker design Services, a Utah corporation.

4 That I am myriam Onyeabor's tenant at 1755 south 4490 west and have known her for two years now.

5 That my company had been building offices inside the building and just moved in over a year ago

6 That on July 27th 2006,I was approached by on Mr. Raile of Sun Optics /LEBR.

7 That Mr. Raile wanted to talk to m about Myriam Onyeabor.

8 That Mr. Raile said quite a few derogatory things about Myriam Onyeabor tome.

9 That Mr. Raile was condescending to Myriam Onyeabor

10 That he did not speak about her as though she were the landlord of her property.

11 That Mr. Raile made it seem as though he were the landlord of myriam Onyeabor's property and she were a tenant or subordinate.

12 That Mr. Raile seemed quite certain what Ms Onyeabor could and could not do on her property.

13 That Mr. Raile was trying to influence my decision on whether or not to do business with Myriam Onyeabor.

14 That his very words with regards to the building were: You are not going to be buying the property because she owes me a Lot of money.

15 That I also felt that myriam Onyeabor should be the one to tell me those details if she cared to tell them to me.

16 That everything he said was an effort to influence my business decisions with Myriam Onyeabor, and so, I found it quite condescending to me personally.

17 That I have known MyriamOnyeabor for two years and she is a reliable, honest and understanding person, and so I decided to tell Ms Onyeabor about it.

18 That MyriamOnyeabor was extremely upset when I told her about it.

DATED THIS___3_____DAY OF December, 2007

___/s/_____

James Walker

SUBSRIBED AND SWORN to me, this 3 day of December 2007

___/s/_____

Lucie smith
NOTARY PUBLIC
4220 west 2100 south #A
Salt Lake City Utah 84114
My commission expires August 10 2010
State of Utah

APPENDIX R

MR. ROBERT MILL'S AFFIDAVIT (Record at 2131)

MYRIAM N ONYEABOR (Pro se)
P.O 521297
Salt Lake City UT. 84152
801-259-1195
FAX 801-487-9005

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY STATE OF UTAH

CENTENNIAL POINT PROPERTY OWNERS ASSOCIATION AND LEBR. ASSOC. LLC. **Judge Stephen Roth**
Case No 040918762
v
MYRIAM ONYEABOR.
v.
Bruce Raile and Donald Sanborn.

STATE OF UTAH:
Robert Mills, being duly sworn and upon oath deposes and states the following:
1) That I am over the age of 18, capable and competent to testify in a court of law.

2) That I was an agent of Commerce CRG, a Salt Lake City based Realtor, at the time that these incidents occurred.

3) That Mr. Travis Healey represented Myriam Onyeabor in the purchase of Unit 1 and 2 and that Bryce Kelly represented Mr. Sanborn on Unit 1, and I represented Mr. Sanborn on Unit 2.

4) That I was aware that Myriam Onyeabor had hired Travis Healey/Commerce CRG to represent her in this purchase.

5) That subsequent to the sale of Unit 1 to Myriam Onyeabor, Mr. Sanborn hired Robert Mills/Commerce CRG to represent him and sell the rest of the Units in Centennial Point Industrial Park, on his behalf.

6) That I submitted bids, offers, counter offers from Travis Healey/Myriam Onyeabor to Mr. Sanborn and still have a file at Commerce CRG to affirm that.

7) That I delivered CC&R's to Travis Healey for him to deliver to his client, Myriam Onyeabor.

8) That we received an offer from Myriam Onyeabor on Unit 1 for $276,500.00 which Mr. Sanborn rejected because Unit 1 was the most valuable Unit of the complex.

9) That the parties renegotiated and agreed on a price of $330,000.00 for Unit 1.

10) That Myriam Onyeabor bought Unit 1 in April of 2000.
11) That Commerce CRG continued to market the rest of the project on behalf of Mr. Sanborn.

12) That Myriam Onyeabor called me in early 2005 telling me that she just heard that the CC&R of Centennial Point had been changed back in 2000.
13) That Myriam Onyeabor was sounded quite shocked.
14) That when Myriam Onyeabor asked me if the CC&R's were ever changed, that I told her that I did not think so, or that I could not remember them being changed.
15) That Later, when I contacted Mr. Sanborn to inquire about the CC&R's being changed, he reminded me that the CC&R's

were changed at the request of Mr. Raile, before Mr. Raile of LEBR bought his property, and as a condition to buying his own property from Mr. Sanborn.

16) That I then contacted Myriam and let her know that I was reminded that they had been altered and that *I* didn't recall knowing the nature or scope of the changes.

DATED THIS__17th_____DAY OF November, 2005

___/s/_____

ROBERT MILLS

SSAUBSRIBED AND SWORN to before me, this ___17th day of November 2005

___/s/_____

Luanne Cutler
NOTARY PUBLIC

State of Utah
175 East 400 South Suite 700
Salt Lake City Utah 84111
My commission expires 06/12/2006

APPENDIX S

AFFIDAVIT OF TRAVIS HEALEY (Record at 2136)

MYRIAM N ONYEABOR (Pro se)
P.O 521297
Salt Lake City UT. 84152
801-259-1195
FAX 801-487-9005

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY STATE OF UTAH

CENTENNIAL POINT
PROPERTY OWNERS ASSOCIATION AND LEBR. ASSOC. LLC.
v.
MYRIAM ONYEABOR.
Plaintiff ,,
v.
Bruce Raile and Donald Sanborn.

Case No 040918762
Judge Stephen Roth

STATE OF UTAH:
Travis Healey, being duly sworn and upon oath deposes and states the following:

1. That I am over the age of 18, capable and competent to testify in a court of law.

2. That I was an agent of Commerce CRG, a Salt Lake City based Realtor, at the time that these incidents occurred.

3. That I am an agent of Commerce CRG, LLC

4. That I was involved in the purchase of Myriam Onyeabor's property at 1755 south 4490 west and represented her.

5. That I hereby affirm the statements in my prior affidavit in this case.

6. That in addition to my prior statements, I would add that Myriam Onyeabor started complaining to me about Mr. Raile and his workers blocking the way into her building and bothering her ,way backing in 2001.

7. That she stated that Mr. Raile and his employees were mostly on her property and hardly on theirs.

8. That at one point in 2001,Myriam Onyeabor was so angry that she said that if this aggravations with Mr. Raile and his employees continued she would want her money back.

9. That I told her that the sale was complete and there was nothing I could do.

10. That I am also aware that the case escalated in 2003 and 2004, because Myriam Onyeabor called me and told me about it.

11. That on a few occasions, Myriam Onyeabor had been upset and crying over the phone , as we talked about how she is being treated, on her property, by Mr. Raile and his employees

12 That I remember her saying that she was being treated as if she were a second class on her own property.

13 That she seemed genuinely depressed, and stressed out about the situation.

DATED THIS_____13____DAY OF December, 2006

___/s/_____
Travis Healey

SUBSRIBED AND SWORN to before me, this 13 day of December 2006
___/s/_____

Luanne Cutler
NOTARY PUBLIC

State of Utah
175 East 400 South Suite 700
Salt Lake City Utah 84111